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No. _____
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In The

Supreme Court of the United States

DARWIN R. GRIFFITH,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

SEYMOUR J. KAGAN, ESQUIRE
Counsel of Record
CARL W. ERLER, III, ESQUIRE
BERRY, KAGAN, SAHRADNIK, KOTZAS
& RIORDAN
212 Hooper Avenue
P.O. Box 757
Toms River, New Jersey 08754-0757
(732) 349-4800

Counsel for Petitioner
Darwin R. Griffith

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Whether the Fifth and Fourteenth Amendments of the United States Constitution and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) require this Court to provide just compensation for a temporary taking of real property, in the context of unreasonable and extraordinary administrative delays in the developmental approval process, which occur prior to a governmental entity's exercise of state statutory provisions enabling that entity to ameliorate a landowner's damages by modifying its conduct and thereby avoid a permanent taking?

II. Whether the lower court erred in finding that:

A. The time consumed by the judicial review of a state agency decision, which contributes to an overall extraordinary delay, prior to the ultimate reversal of an irrational agency decision denying developmental approvals, is inherently part of a reasonable administrative approval process, and therefore, not compensable in a temporary takings claim brought pursuant to the Fifth and Fourteenth Amendments of the United States Constitution?

B. A permit applicant is required to exhaust all available administrative processes prior to instituting a judicial action for a temporary taking where (1) the responsible state agency has rendered a final decision relative to a specifically required permit, that effectively extinguishes all feasible economic development on the applicant's property, and where (2) the simultaneous or sequential pursuit of additional development permits by the applicant would not clarify or broaden the scope of the property's development potential?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner in this Court, Darwin Griffith, was the land development applicant in the administrative proceedings below, as well as the appellant to the Superior Court of New Jersey, Appellate Division from those administrative decisions. The Petitioner was also the Plaintiff in the permanent and temporary takings actions before the Superior Court of New Jersey, Law Division; the latter of which is the subject of this appeal.

The Respondent, New Jersey Department of Environmental Protection, was the governmental entity to which the Petitioner applied for the land development approvals, and the appellee relative to the Petitioner's appeals from that agency's administative determinations. Respondent was the appellant from the Law Division's decisions regarding the Petitioner's permanent and temporary takings claims.

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This case arises from the New Jersey Judiciary's refusal to follow this Court's Fifth Amendment decisions which provide a compensatory remedy for regulatory action that results in a temporary taking of property. Petitioner Darwin Griffith respectfully requests that a Writ of Certiorari be issued for review of the Superior Court of New Jersey, Appellate Division's decision in *Griffith v. New Jersey*, 340 N.J.Super. 596, 775 A.2d 54 (May 15, 2001). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

OPINIONS BELOW

The following recounts the chronological sequence of the numerous judicial decisions which have culminated in the present appeal:

(1) *Griffith v. New Jersey*, A-6024-93T2 (New Jersey Superior Court, Appellate Division, unreported decision filed May 24, 1996). (App. 22-36).

(2) *Griffith v. New Jersey*, A-2667-94T5 (New Jersey Superior Court, Appellate Division, second unreported decision filed May 24, 1996). (App. 37-68).

(3) *Griffith v. New Jersey*, OCN-L-2456-95 (New Jersey Superior Court, Law Division, unreported decision dated February 11, 1998). (App. 69-104).

(4) *Griffith v. New Jersey*, A-4260-97T1 (New Jersey Superior Court, Appellate Division, unreported decision filed May 3, 1999). (App. 105-114).

(5) *Griffith v. New Jersey*, OCN-L-2456-95 (New Jersey Superior Court, Law Division unreported decision dated January 31, 2000). (App. 115-136).

(6) *Griffith v. New Jersey*, 340 N.J.Super. 596, 775 A.2d 54 (May 15, 2001). (App. 1-21).

(7) New Jersey Supreme Court denied review of the Appellate Division's decision by way of Order filed on September 10, 2001. (App. 137).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions, treaties, statutes, ordinances, and regulations involved in this case are:

1. United States Constitution, Amendment V. (App. 138).
2. United States Constitution, Amendment XIV, § 1. (App. 138).
3. New Jersey Constitution, Article I, § 20. (App. 139).
4. N.J. Stat. Ann. § 13:9B-22(b) of the New Jersey Freshwater Wetlands Protection Act. (App. 139).

STATEMENT OF THE CASE

This is an inverse condemnation case involving a regulatory temporary taking. This Petition for Certification seeks review of the Order of the Superior Court of New Jersey, Appellate Division which reversed the trial court's judgment awarding Mr. Griffith damages for the temporary taking of his land, as well as counsel fees and costs. (App. 21).

Petitioner is the sole owner of a vacant 63+/- acre parcel of property located in Little Egg Harbor Township, New Jersey. Freshwater wetlands comprise approximately 23 acres of the site and the 40 acre balance consists entirely of developable uplands. The upland area is inaccessible without crossing the wetlands, and the wetland area is the site's only frontage along an adjacent public road.

In 1988, Mr. Griffith sought to protect the market value of his property, by obtaining governmental

approval to fill a small portion of its wetland area in order to construct a suitable access road to the 40 acres of buildable uplands. Petitioner filed an application with the New Jersey Department of Environmental Protection (DEP) for an individual Freshwater Wetlands Permit (FWP). In that application, Mr. Griffith proposed a two-way roadbed, with a minimal 26 foot paved width for accessing the uplands. The requested permit would have required filling ***less than one-half acre*** of wetlands.

During the ensuing FWP administrative process, Mr. Griffith experienced an inordinate number of administrative hearings and unwarranted delays. In fact, it took over eight years for the DEP to finally issue an appropriate FWP and even then, it was only after the judiciary ordered the agency to either do so or compensate Mr. Griffith for the permanent taking of his property. (App. 36). During this extensive time frame, the following series of administrative hearings ensued:

- *July 19, 1989* – DEP denied Petitioner's FWP application. Petitioner petitioned the DEP Commissioner for an Office of Administrative Law (OAL) Hearing.
- *August 8, 1990* – An Administrative Law Judge (ALJ) required Petitioner to pursue an alternative off-site access route to the site's uplands, involving a complex Quiet Title Action. Petitioner appealed.
- *November 5, 1990* – DEP Commissioner rejected the ALJ's decision and remanded for another OAL Hearing.
- *August 12, 1991* – ALJ found that Petitioner need not pursue a Quiet Title Action and that an FWP could be issued; however, DEP limited the Petitioner to a 16-foot wide access road. Petitioner appealed.
- *December 20, 1991 – **A second review by the DEP Commissioner*** resulted in affirmance of the ALJ's findings; however, the Commissioner remanded the case to the OAL to review the DEP's reclassification of wetlands.
- *March 16, 1992* – ALJ issued a consent order directing the DEP to issue an appropriate FWP.

- *June 25, 1992* – The DEP issued an FWP with unacceptable conditions. Petitioner appealed.
- *June 23, 1993* – ALJ ordered an evidentiary hearing concerning the DEP's newly proposed road relocation.
- *February 22, 1994* – ALJ issued an initial decision approving the other restrictions set forth in the original FWP. Plaintiff filed exceptions.
- *May 25, 1994* – ***A third review by the DEP Commissioner*** resulted in a final decision requiring that Mr. Griffith obtain a major permit modification.

(App. 140-222).

Since the end result of foregoing five years of administrative proceedings was an overly restrictive FWP that essentially limited development on the 40 acres of uplands to a single family residence, Mr. Griffith filed an appeal with the Appellate Division. On May 24, 1996, the Appellate Division found the DEP's actions to be patently unreasonable and remanded the matter for the issuance of an appropriate FWP. (App. 36). The DEP finally complied on October 21, 1996. (App. 221-222).

While diligently pursuing the FWP through the aforementioned administrative and judicial process, Mr. Griffith also sought additional approvals relative to the development of the site's uplands, including a Coastal Area Facilities Review Act (CAFRA) permit, an amendment to the Ocean County Water Quality Management Plan (208 Amendment), and an on-site Wetlands Mitigation Plan. The DEP also acted unreasonably pursuant to these approvals.

Mr. Griffith's CAFRA application was deliberately delayed by the DEP, and in July 1994 more stringent CAFRA regulations came into effect. In December 1994, over one year after the CAFRA application was filed, the DEP claimed that the application was incomplete and cancelled it. Actually, the cancellation was baseless, and

the data requested by the DEP was immaterial to completing a well informed environmental review. (App. 223-224).

In January of 1994, Mr. Griffith filed an application for a 208 Amendment. In March of 1995, the DEP denied same, but only after twice revising its alleged reasons for doing so. (App. 225-228).

The Agency also acted questionably with regard to Mr. Griffith's proposed plan for on-site wetland mitigation. Despite having received the Plaintiff's plan in August of 1988, the DEP waited until August of 1993 to first advise the Plaintiff that on-site mitigation *might be rejected* and until November 1993 to confirm that the plan was unacceptable. (App. 229-233). This late rejection of the Plaintiff's mitigation plan contradicted the DEP's 1988 guidance under which Plaintiff's mitigation effort was developed.

In January 1995, while his appeal concerning the DEP's issuance of an overly restrictive FWP was pending in the Appellate Division, Mr. Griffith also filed an appeal with that court relative to his CAFRA permit, Wetlands Mitigation Plan and 208 Amendment applications. Ultimately, the Appellate Division affirmed the DEP's cancellation of those applications based upon the DEP's presumed expertise in environmental matters and for Petitioner's *perceived* failure to exhaust administrative procedures. (App. 68).

On July 19, 1995, while the foregoing judicial appeals were pending, Mr. Griffith filed a complaint in the Law Division, alleging the inverse condemnation of his property based upon the DEP's deleterious actions. Mr. Griffith premised his inverse condemnation action upon both state and federal constitutional provisions. (App. 242, 249, 258, 264 & 268). During 1997, a lengthy trial was held on the issue of liability. On February 11, 1998, the trial court rendered an extensive written opinion which found that the DEP had effectuated a permanent taking of

Mr. Griffith's property as of June 25, 1992 (i.e., the date the DEP issued a FWP with restrictive conditions). (App. 104). Nevertheless, the trial court effectively gave the DEP until April 6, 1998 to ameliorate Mr. Griffith's damages pursuant to N.J. Stat. Ann. § 13:9B-22(b) of the New Jersey Freshwater Wetlands Protection Act (FWPA).[1] (App. 104). That statute allowed the DEP to modify its action to avoid a permanent taking of Mr. Griffith's property and ameliorate his damages.

The DEP appealed and on May 3, 1999, the Appellate Division determined that the trial court's decision should be deemed interlocutory until the agency was afforded the opportunity to utilize the "safety-valve" provisions of the FWPA. (App. 114). **The Appellate Division did not disturb the trial court's finding of a taking; however, the Court concluded that the DEP should be given a more substantial period of time in order to ameliorate Mr. Griffith's damages.** (App. 114).

In June 1999, on remand to the trial court and before entry of a final judgment awarding damages to Mr. Griffith for a permanent taking, the DEP exercised its option to ameliorate Petitioner's damages pursuant to N.J. Stat. Ann. § 13:9(B)-22(b) of the FWPA. The agency agreed to resolve all development issues still outstanding with Petitioner (i.e. CAFRA, 208 Amendment, and on-site

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[1] N.J. Stat. Ann. § 13:9B-22(b) provides: If the court determines that the issuance, modification, or denial of a freshwater wetlands permit by the department pursuant to this act constitutes a taking of property without just compensation, the court shall give the department the option of compensating the property owner for the full amount of the lost value, condemning the affected property pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C. 20:3-1 et seq.), or modifying its action or inaction concerning the property so as to minimize the detrimental effect to the value of the property.

wetlands mitigation).[2] By that time, however, Petitioner had already been incredibly delayed by the DEP's excessively burdensome administrative process. Therefore, Mr. Griffith sought and was awarded damages for the temporary taking that the agency's egregious administrative conduct had caused between June 1992 (i.e. when the DEP first issued a FWP with inappropriate conditions) and September 1999 (i.e. when the DEP finally issued the remaining development approvals). (App. 115-136). After the trial court entered a final judgment, the DEP appealed.

On May 15, 2001, the Appellate Division reversed the trial court's temporary takings judgment in its entirety and remanded the matter to the Law Division for dismissal. (App. 21). The Appellate Division summarily concluded that the administrative obstacles and delays endured by Mr. Griffith were inherently reasonable. The Appellate Division held that the DEP's option to ameliorate Petitioner's damages under the FWPA did not ripen until its prior 1996 opinion (which found that the DEP had acted unreasonably in not issuing a less restrictive FWP) and that a temporary taking could not have occurred prior to that time. (App. 14). The Appellate Division concluded that appeals to that court were inherently part of the administrative decision-making process and that any time consumed by the judicial review process came within the ambit of reasonable administrative procedure and could not serve as the basis for a taking; regardless of how unreasonable the underlying agency decision may be and regardless of how long it takes an applicant to obtain the requested permit. (App. 14-15).

As a secondary ground for reversal, the Appellate Division ruled that the Petitioner could not have been

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[2] Notably, the granting of all of these permits was consistent with Petitioner's application in 1988 with the exception that the permits were for a 43 lot subdivision while the initial application was for 44 lots.

deprived of the viable economic use of his land because he lacked other required development approvals. The Court concluded that Mr. Griffith was required to completely exhaust the available regulatory process before pursuing a takings claim. (App. 16-17). Thus, the Appellate Division ruled that Mr. Griffith's temporary takings claim was "premature" even though a continuing effort to secure those outstanding approvals would not have clarified the site's permissible development due to the DEP's overly restrictive FWP.

On June 28, 2001, Petitioner filed a Petition for Certification with the Supreme Court of New Jersey contending that the Appellate Division's decision condoned a temporary taking of his property in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 20 of the New Jersey Constitution. Petitioner essentially contended that the Appellate Division's construction of N.J. Stat. Ann. § 13:9B-22(b) was such that the administrative approval process, prior to the DEP's exercise of its statutory right to ameliorate a takings situation, could never constitute a temporary taking of property, no matter how egregiously lengthy that process may be and that the Appellate Division's decision was untenable because it provided the DEP with unfettered discretion to unreasonably delay the administrative approval process, without providing just compensation.

While the Petition for Certification was pending before the Supreme Court of New Jersey, this Court rendered a decision (on June 28, 2001) in *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001). Since the *Palazzolo* decision heavily impacted the issues in dispute in this litigation, Mr. Griffith submitted a supplemental letter brief to the New Jersey Supreme Court which recounted perceived errors in the Appellate Division's decision, when examined under the *Palazzolo* ruling. These errors included the Appellate Division's holding that Petitioner's inverse

condemnation claim was "premature" and that he had to pursue, to administrative finality, all the professionally intensive residential subdivision applications (i.e. CAFRA, 208 Amendment, and on-site wetlands mitigation), still unobtained at the time the inverse condemnation action was filed, even though those additional approvals would not have broadened the scope of permissible development under the restrictive FWP. In addition, Petitioner argued that the *Palazzolo* opinion clearly refuted the Appellate Division's determination that appeals to that court were inherently part of the administrative decision-making process and that the overall time consumed in securing a judicial ruling, plus any time the DEP expends in exercising its amelioration option under the FWPA falls within the ambit of reasonable administrative procedure regardless of how extraordinary that process may be. The New Jersey Supreme Court denied Mr. Griffith's Petition for Certification on September 6, 2001. (App. 137).

REASONS FOR ALLOWANCE OF THE WRIT

I. THE APPELLATE DIVISION'S HOLDING THAT A TEMPORARY TAKING OF REAL PROPERTY CANNOT BE FOUND FOR UNREASONABLE AND EXTRAORDINARY DELAYS IN AN ADMINISTRATIVE APPROVAL PROCESS, WHICH OCCUR PRIOR TO THE EXERCISE OF STATE STATUTORY PROVISIONS ALLOWING THE AGENCY RESPONSIBLE TO AMELIORATE A PERMIT APPLICANT'S DAMAGES AND AVOID A PERMANENT TAKING OF REAL PROPERTY, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SHOULD BE REVERSED.

The Appellate Division's decision eviscerates the entire concept of a temporary regulatory taking, violates the Fifth and Fourteenth Amendments of the United States Constitution, and should be reversed. Specifically,

the Appellate Division erred in concluding that the administrative permit process may be indefinitely extended until such time as the DEP is judicially required to exercise the amelioration provisions of the FWPA, in order to avoid a permanent taking, and that no temporary taking may be found for extraordinary administrative delays that occur prior to the DEP's exercise of its amelioration option under N.J. Stat. Ann. § 13:9B-22(b) of the FWPA; no matter how unreasonable in duration that time period may be and no matter how unjustifiable the DEP's actions may have been in failing to grant an appropriate permit earlier in the administrative process.

To date, this Court's most instructive opinion concerning the temporary takings issue has been *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In that case, the appellant owned a campground located in a floodplain. *Id.* A storm flooded the watershed in which the campground was located and destroyed its various buildings. *Id.* In response, Defendant adopted an interim ordinance prohibiting the construction or reconstruction of any structures within a delineated flood protection area. Said area included the site where the campground once stood. *Id.*

The appellant church filed a complaint alleging, in part, that the ordinance denied all viable use of the campground and sought damages. *Id.* at 308. The Defendants moved to strike certain portions of the complaint, based upon a prior California Supreme Court decision which held that a landowner may not maintain an inverse condemnation suit premised upon a temporary regulatory taking. *Id.* The trial court granted the motion, the California Court of Appeals affirmed that ruling, and the California Supreme Court denied review. *Id.* at 309.

On appeal, the U.S. Supreme Court squarely addressed "whether the Just Compensation Clause [of the 5th Amendment and as applied to the states through the

14th Amendment] requires government to pay for 'temporary' regulatory takings." *Id.* at 313. In holding in the affirmative, the Court noted:

> [The Fifth Amendment] does not prohibit the taking of private property, but instead places a condition of the exercise of that power . . . This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.
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> . . .
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> It has also been established doctrine at least since . . . *Pennsylvania Coal Co. v. Mahon* that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."
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> . . .
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> The Court has recognized . . . that the government may elect to abandon its intrusion or discontinue regulation . . . Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a "temporary" taking be deemed a permanent taking. But we have not resolved whether abandonment by the government requires payment of compensation of the period of time during which regulations deny a landowner all use of his land.
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> . . .
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> [The Court's prior decisions] reflect the fact that "temporary" takings which . . . deny a

landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation . . . In the present case the interim ordinance was adopted . . . in January 1979, and became effective immediately. Appellant filed suit within a month after the effective date of the ordinance and yet when the California Supreme Court denied a hearing in the case on October 17, 1985, the merits of appellant's claim had yet to be determined. The United States has been required to pay compensation for leasehold interests of shorter duration than this. The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed . . . Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period . . . Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. *Id.* at 314-319. (Citations omitted.)

In closing, the Court stated in relevant part:

Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, "permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . We merely hold that where the government's activities

> have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.
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> . . .
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> Here we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. The judgment of the California Court of Appeal is therefore reversed . . . *Id.* at 321-322.

Lutheran Church clearly requires just compensation for temporary regulatory takings. The context of that case, however, was whether such compensation was due for the period of time from the inception of an interim ordinance prohibiting development until the invalidation of the ordinance. The case at bar does not involve the invalidation of a state government regulation but rather involves a final state agency decision, which is the result of an irrational interpretation and application of statutory schemes to a particular site, and whether just compensation is due for the extraordinary delays that ensue from the inception of that agency decision to the time that the agency is judicially forced either to alter its decision or to compensate the landowner for a permanent taking. Petitioner submits that no logical differentiation exists between the factual situation in *Lutheran Church* and the case *sub judice*, because the net effect on the property owner is the same.

Generally, this Court's earlier regulatory takings rulings have required property owners, contesting administrative decisions, to demonstrate (1) that they have received a final decision from the government entity

charged with implementing the regulations regarding the application of challenged regulations to the property and (2) that they have sought compensation through the procedures the State has provided. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997).

Under the first ("final decision") prong of this test, this Court requires that the applicant obtain a "final, definitive position [from the agency] regarding how it will apply the regulation at issue to the particular land in question . . . " *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985). More recently, this Court further refined an applicant's duties under this first prong. In *Palazzolo*, the Court held that a final decision by the government entity responsible, will satisfy this test when the decision reveals the extent of development allowable on a given property. *Id.* at 2461.

In *Lutheran Church*, this Court did not directly address when a governmental entity could be held liable to provide just compensation for administrative delays attendant to obtaining a final decision from a governmental agency. The Court stated in its opinion closing:

> We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits . . . and the like which are not before us. *Lutheran Church* at 321.

In 1997, the New Jersey Superior Court, Appellate Division in *East Cape May v. State of New Jersey Dep't of Envtl. Prot.*, 300 N.J.Super. 325, 693 A.2d 114 (App. Div. 1997) discussed the concept of a temporary regulatory taking due to administrative delay, while reviewing a Law Division decision which granted summary judgment to a developer that had challenged the denial of its application to develop property for residential use. The Appellate Division specifically referenced the closing portion of *Luthern Church* and noted:

> . . . The Court did not decide when a taking occurs, or that delays incidental to a regulatory process constitute a temporary taking. . . .
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> . . .
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> If the end result of the process of applying for development permits is to allow reasonable utilization of the . . . property, the developer will not necessarily be entitled to compensation for the delay between the initial denial of its application and the ultimate issuance of a development permit. The process of applying for a development permit and satisfying the DEP's requirements for its issuance is necessarily protracted. The delay incident to the process, like any other burden of permissible regulation, is a burden inherent in the ownership of property and not a constitutional taking . . . **Even if we assume that an unduly protracted application process might constitute a temporary taking, there is no basis in the present summary judgment record for concluding that, as a matter of law, the duration of the process in this case has been, or will have been, so disproportionate to the complexity of the regulatory scheme that the process itself was the equivalent of a temporary taking of the property** . . . *Id.* at 342-343 (Emphasis added.) (Citations omitted.)

Although the foregoing does not specifically delineate the particular circumstances in which a temporary regulatory taking may be found, the clear implication is that such a taking may be found for extraordinary delays or unnecessarily protracted administrative processes endured by a permit applicant prior to an agency's issuance of a final decision relative to the permit.

In this case, the Petitioner's initial FWP application process, alone, took a period of ***over eight years***.[3] The delay caused by this process was undeniably extraordinary and cannot realistically be characterized as a mere incident of ownership.[4] The extraordinary administrative delays experienced by Mr. Griffith, however, were not confined to his FWP application. Indeed, during the permanent taking trial the Law Division specifically noted that the DEP intentionally and constantly shifted its position on several issues relative to the wetlands mitigation, CAFRA, and 208 Amendment approvals. (App. 102). Additionally, the trial court found that the DEP had breached its statutory duty by failing to provide Mr. Griffith with any meaningful guidance in order for him to gain approval of his applications. (App. 104). Finally, the trial court noted that Mr. Griffith was adversely impacted by the "constant flux" in the laws governing the subject property, as well as the Defendant's ever-shifting interpretation thereof. (App. 102).

The Law Division applied the principles of *Lutheran Church* to the aforesaid regulatory delays and determined that the DEP had caused a temporary taking from June 25, 1992 (i.e. the date the agency issued its first onerously conditioned FWP), until the DEP's exercise of the FWPA amelioration option (i.e. September 1, 1999). (App. 119, 135). The trial court awarded just compensation for the temporary taking, as well as counsel fees and costs. The DEP appealed the trial court's decision, and the Appellate Division reversed, holding:

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[3] The FWP application was submitted to the DEP in August of 1988, but a reasonably conditioned FWP did not issue until October 1996.

[4] The Appellate Division even noted " . . . the substantial difficulty [Mr. Griffith] encountered in the approval process" at the time it ordered the issuance of the FWP in 1996. (App. 24).

> . . . normal or at least not unreasonable delays in the land use permit and approval process as well as extraordinary delays not attributable to government do not constitute temporary compensable takings. (App. 11-12).

After setting forth this legal standard, the Appellate Division framed the legal issue as follows:

> . . . was there an unreasonable delay fairly attributable to DEP between the date of . . . issuance of the restrictive FWP in 1992 and its ultimate grant, by way of amelioration, of all . . . approvals . . . in September 1999? (App. 13).

After setting forth the legal grounds upon which a regulatory temporary taking may be found and properly framing the legal issue, the Appellate Division failed to set forth *any* relevant analysis concerning the reasonableness of the extraordinary delays experienced by Mr. Griffith. In fact, the Appellate Division failed to mention that an overall *eleven-year* period transpired between the time the FWP application was initially submitted in 1988 to the time all the appropriate permits were granted in 1999 and even failed to address the so-called "reasonableness" of the outrageous eight-year FWP process during which Mr. Griffith endured three appeals to the DEP Commissioner, four appeals to the OAL, and a review by the judiciary. These delays, in and of themselves, were inherently unreasonable. The Appellate Division also completely failed to analyze the reasonableness of the administrative proceedings that occurred during the seven-year delay that ensued between the issuance of the first FWP, with onerous conditions, in June of 1992 and the granting of all necessary permits in 1999.

The trial court specifically recognized the unreasonableness of the foregoing delays, and found that a temporary taking had been effectuated. Whereas, the Appellate Division simply glossed over the incredible

administrative process that the Petitioner had to overcome for over a decade and broadly concluded:

> . . . it was not until this court in its 1996 opinion held that a less restrictive permit should have been issued that DEP's option to ameliorate that restriction under N.J.S.A. 13:9B-22(b) ripened. The fact of the matter is that DEP effectively extended the regulatory process in a reasonable and statutorily permissible manner by opting promptly thereafter to ameliorate by issuing a FWP in full compliance with Petitioner's road-development application . . . (App. 14).

Although the Appellate Division set forth the appropriate legal standard for finding a temporary taking (i.e., whether there was an unreasonable or extraordinary administrative delay), that court failed to undertake any analysis in that regard, and rendered a net opinion devoid of any analysis of the factual findings by the trial court. Instead, the Appellate Division issued a blanket ruling regarding delays experienced by permit applicants. The court held that, prior to exercising the FWPA's amelioration provisions, the agency's administrative process was inherently reasonable and could never constitute extraordinary delay regardless of any unjustifiable actions for which an agency is responsible. The Appellate Division's decision completely undermines the principles enunciated in *Lutheran Church* and is irreconcilable with the statutory language of N.J. Stat. Ann. § 13:9B-22, which recognizes that an exercise of that statute's amelioration provision necessarily results from a taking. Accordingly, the Appellate Division's decision should be reversed.

II. THE APPELLATE DIVISION'S DECISION CONTRAVENES THE U.S. SUPREME COURT'S PRIOR OPINIONS BECAUSE (1) IT INDEPENDENTLY FOUND THAT THE JUDICIAL REVIEW OF AN IRRATIONAL STATE AGENCY DECISION IS INHERENTLY PART OF A REASONABLE ADMINISTRATIVE PROCESS AND THAT EXTRAORDINARY DELAY CANNOT EXIST BETWEEN THE INITIALLY EFFECTIVE DATE OF SUCH A DECISION AND THE CONCLUSION OF THE ATTENDANT JUDICIAL REVIEW, AND (2) IT ERRONEOUSLY REQUIRES A REAL PROPERTY OWNER TO COMPLETELY EXHAUST ALL ADMINISTRATIVE PROCESSES AS A PREREQUISITE TO BRINGING AN ACTION FOR A TAKING, EVEN WHEN SUCH PROCESSES WOULD NOT CLARIFY THE EXTENT OF PERMISSIBLE DEVELOPMENT ON A GIVEN PROPERTY.

The Appellate Division's decision should be reversed because it is in contravention of this Court's decisions. Specifically, the Appellate Division, without citing any legal precedent, determined that judicial reviews of state agency decisions are within the ambit of reasonable administrative processes and that extraordinary delay cannot exist between the agency's initial issuance of such decisions and the conclusion of the associated judicial review. (App. 14-15). Effectively, the court found that extraordinary delay may never be compensable as a temporary taking, no matter how unreasonable the agency decision may be underlying the appeal and no matter how long it takes the applicant to finally receive a useable permit.

In addition, the lower court erroneously concluded that the Petitioner's inverse condemnation claim was premature because he did not pursue all available regulatory processes to their conclusion. (App. 16-17). The lower court made this determination even though it is inarguable that such additional administrative action would not

have further clarified the scope of permissible development on Petitioner's property once the DEP had issued a FWP prohibiting two-way access to the uplands and thereby, limiting development to, at most, a single family residence.

The *Palazzolo* opinion is significant in that it sets forth the legal standards for determining whether a takings claim is ripe for consideration by the judiciary. In that case, petitioner owned a 20-acre waterfront parcel of land in Rhode Island. Approximately 18 acres of the property were designated as coastal wetlands and required considerable fill before any structures could be built thereon. *Id.* at 2458. Nevertheless, the petitioner sought to develop the property, including its large wetland area.[5] After the petitioner's various development proposals were rejected by respondent Rhode Island Coastal Resources Management Council ("Council"), the petitioner instituted an inverse condemnation action in state court contending that the application of the Council's wetlands regulations resulted in a taking of his property without just compensation. The petitioner's arguments before the Rhode Island State Courts were unsuccessful; however, he sought and was granted certiorari by this Court. *Id.*

The *Palazzolo* opinion addressed several takings issues. One of the issues which this Court addressed, indirectly, was whether the judicial review of state agency decisions may fall within the ambit of reasonable administrative processes, and whether an inverse condemnation action's ripeness was dependent upon a prior judicial review of the agency action and the agency's subsequent exercise of state statutory provisions allowing the agency to ameliorate an applicant's takings damages. *Id.* at 2462.

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[5] Significantly, one of the petitioner's earliest development proposals involved filling the parcel's entire 18 acres of wetlands. *Id.*

The *Palazzolo* opinion's discussion concerning the ripeness of takings claims is also relevant to a review of the case *sub judice* for another significant reason. Specifically, this court addressed the extent to which the Petitioner was required to exhaust additional administrative avenues prior to seeking compensation for a taking of his property and whether he had failed to meet this requirement. Each of these issues and the court's analysis thereof is discussed in the context of the present case below.

(A) The Appellate Division's Decision Should Be Reversed Because It Effectively Found That The Judicial Review Of An Irrational State Agency Decision Is Inherently Part Of A Reasonable Administrative Process And That Extraordinary Delay Cannot Exist Between The Initially Effective Date Of Such A Decision And The Conclusion Of The Attendant Judicial Review.

The court below determined that the administrative process, relative to the issuance of a FWP, was not concluded until the DEP was faced with the choice of either issuing a FWP with appropriate conditions or in the alternative, condemning the subject property. The Appellate Division concluded that the FWP administrative process included all agency hearings, as well as all judicial proceedings leading up to the agency's exercise of its amelioration option under the FWPA and that the delays endured by the permit applicant, prior to the DEP's exercise of that option, may never constitute part of a compensable taking even if the agency action underlying the appeal to the judiciary was patently unreasonable or irrational. (App 14-15). The Appellate Division's holding is such that a state agency may never be held accountable for a temporary taking and should be reversed.

Although not a "temporary" takings case, this Court's opinion in *Palazzolo* is significant because it set

forth the standards for determining whether a takings claim is ripe for judicial consideration. The Court indicated that such a claim does not ripen until the ***government entity*** or ***responsible state agency*** charged with implementing the regulations has reached a ***final decision*** regarding the application of the regulations to the property and that such a decision "informs the constitutional determination whether a regulation" has deprived a landowner of all economically beneficial use of his property or destroyed the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred. *Id.* at 2458. (Emphasis added.)

Applying these judicial ripeness standards, the Court noted that the issue presented was whether the petitioner had obtained a ***final decision from the Council*** concerning the permitted use of his property and whether uncertainty remained as to the extent of development ***the Council*** would allow. *Id.* (Emphasis added.) The aforesaid principles make it clear that before deciding whether a takings claim is ripe, a reviewing court must look at the final decision of the ***government entity*** responsible for determining the extent of allowable development on a particular parcel, and in that context, should not consider a prior judicial review of an agency decision to be part of a reasonable administrative process.

In the Petitioner's case, and contrary to this Court's principles, the Appellate Division broadly stated:

> . . . Plainly, therefore, the administrative process in respect of the FWP was not concluded until an amelioration opportunity was provided to DEP [by the judiciary]. It exercised its amelioration option and, as a result, Petitioner obtained his desired permit. Beyond that, we are satisfied that appeals [to the judiciary] from administrative actions are . . . sufficiently part of the administrative process itself as to

> come within the ambit of reasonable administrative delays which, by definition, do not constitute a taking. (App. 14-15).

In reaching that conclusion, the Appellate Division failed to cite any authority that allows a court to blur the distinction between administrative action taken by a state agency under the executive branch and a review of that action by the judiciary. The court's takings analysis completely ignores both the Constitutional Separation of Powers Clause and the *Palazzolo* opinion's ripeness criteria, under which agency action is the only determinative factor.

Moreover, the Appellate Division's inclusion of judicial review as part of a state agency's reasonable administrative decision-making process essentially eviscerates the entire concept of a temporary taking in that the agency first has the opportunity to have the judiciary review the reasonableness of its decisions and then, if necessary, the agency is given the further opportunity to amend its decisions to comply with the judiciary's determination; all without any concern of being subjected to claims for a temporary taking based upon the extraordinary delays that ensue between the issuance of an irrational agency decision and the ultimate reversal or modification of that decision by the judiciary.

Undeniably, the Appellate Division has completely incorporated the judicial review of state agency action into the administrative process and has concluded that even if the reviewing court ultimately determines that an agency decision was unreasonable, then all extraordinary delays experienced by a permit applicant prior to that determination are inherently reasonable. Therefore, the agency can never be held accountable for a temporary taking, due to irrational decisions that are rendered following an unduly protracted administrative process. In fact, the Appellate Division has held that the state agency

may rely upon the judiciary to ultimately correct its decision and/or provide the agency with guidance concerning same, without any regard for the substantial burdens that may be experienced by the land owner. The practical effect of the Appellate Division's decision is that it gives state agencies unfettered discretion relative to the issuance of development permits and provides agencies with blanket immunity from temporary takings claims. Administrative agencies in the State of New Jersey can exercise the amelioration provisions of the FWPA at the end of a judicial review of an unduly protracted administrative process without any concern of incurring claims for temporary takings predicated upon unjust delay.

(B) The Appellate Division's Decision Should Be Reversed Because It Erroneously Requires A Real Property Owner To Completely Exhaust All Administrative Processes As A Prerequisite To Bringing An Action For A Taking Even When Such Processes Would Not Clarify The Extent Of Development Allowed On A Particular Property.

The Appellate Division's conclusion that the filing of the Petitioner's temporary taking litigation was premature because he did not exhaust the administrative processes attendant with obtaining all the necessary development permits is in contravention of the decision in *Palazzolo* and should be reversed. *Palazzolo* indicates that a property owner need not pursue additional, futile development applications once a state agency has rendered a final decision which clearly defines the extent of permissible development on his property, and where there is no state law exhaustion or pre-permit process requirement.

In the case *sub judice* and in stark contrast to the relief sought by Petitioner Palazzolo, Mr. Griffith sought approval to fill a mere half acre of his site's 23 acres of

wetlands, as a means of ensuring reasonable access to a major subdivision on the property's 40 acres of uplands. Although it took over eight years for the DEP to finally issue an appropriate FWP for such access, plus another three years for that agency to issue the remaining approvals being pursued by Mr. Griffith, the Appellate Division concluded that Mr. Griffith's temporary takings claim was not ripe because he allegedly failed to fully exhaust all of the administrative processes available to him. This holding violates the principles set forth in *Palazzolo*.

In *Palazzolo*, this Court described the legal principle of ripeness in the context of an inverse condemnation action. In so doing, the Court cited its prior opinion in *Williamson County* and stated:

> In *Williamson County*, the Court explained the requirement that a takings claim must be ripe. **The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the *government entity* charged with implementing the regulations has reached a *final decision* regarding the application of the regulations to the property at issue." . . . A final decision by the responsible *state agency* informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property . . . or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred** . . . These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question . . . *Palazzolo* at 2458. (Citations omitted.) (Emphasis added.)

This Court indicated that the "central question" in resolving the ripeness issue was whether petitioner had obtained a ***final decision*** from the Council determining

the allowable use of his land. *Id.* at 2458. The Palazzolo Court concluded that once it became clear that the permissible uses of the property were known within a reasonable degree of certainty, a takings claim was likely to have ripened. The Court stated:

> Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established . . . **Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision** . . . *Id.* at 2459.

This Court concluded that the Rhode Island Coastal Resources Management Council had interpreted its regulations such that the petitioner was barred from engaging in any filling of his wetlands and that the submission of further permit applications was not necessary to establish that point. *Id.* Thereafter, the Palazzolo Court undertook a detailed analysis of the Rhode Island Supreme Court's opinion that the petitioner's takings claim was not ripe. A discussion in that regard follows.

In *Palazzolo,* the Rhode Island Supreme Court initially found that the petitioner's failure to seek approval for developing only the upland area of the property rendered his takings claim unripe. *Id.* at 2460. However, this Court concluded that the petitioner needed to seek an approval limited solely to developing the upland portion of the

property ***only if there was uncertainty as to the permitted use of that area.*** *Id.* Notwithstanding the State's assertions to the contrary, this Court concluded that neither use nor value of the uplands' area remained uncertain because the State previously acknowledged the uplands' value alleged by the petitioner and the trial court testimony confirmed same. *Id.*

The *Palazzolo* opinion is instructive because the inherent value of Mr. Griffith's property depended entirely upon first obtaining the DEP's approval for a wetlands road crossing that would also be compatible with the future use of the uplands as a major subdivision. The factual findings of the trial court demonstrated that any feasible economic development of Mr. Griffith's uplands was unduly delayed by the DEP's first granted FWP, which restricted the upland development to, at most, a single-family residence. (App. 69-104). In its opinion, the Appellate Division improperly attacked Mr. Griffith's decision to initially limit his permit approval pursuits to a FWP and erroneously concluded that his failure to apply *simultaneously* for a CAFRA permit resulted in the DEP being unable to determine whether Mr. Griffith should be allowed a minimal 26 foot wide paved roadway to access 40 acres of upland area that was entirely zoned for 0.5 acre residential lot useage. (App. 13). This conclusion was absolutely untenable and completely ignored the unrebutted expert testimony in the trial record, as well as the factual findings of the trial court.[6]

As indicated throughout the evidentiary record and as concluded by the trial court, Mr. Griffith made it clear from the outset that his FWP application was essential to providing a minimal width of two-way road access that

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[6] The Appellate Division's opinion was also entirely unrealistic to presume that anyone would ever seek approvals to build a single residence on *40 acres* of uplands in this specific locale.

would be compatible with serving a major residential usage of the upland acres. (App. 271-287). The Appellate Division's conclusion to the contrary was entirely unsupported by the case record.

Similar to the property at issue in *Palazzolo*, the permissible use and intrinsic value of Mr. Griffith's land was definitively demonstrated at trial. The lack of a FWP, providing for an appropriate access to support a residential subdivision on the uplands, extremely reduced the value of Mr. Griffith's property. The Appellate Division's conclusion that a CAFRA application would have somehow clarified Mr. Griffith's need for an appropriate FWP to support such a subdivision was totally unsupported by the evidentiary record. As demonstrated by the unrebutted, professional testimony before the trial court, the conditions contained in the initially issued FWP effectively constrained 40 buildable acres to, at most, a single-family dwelling and in so doing, stripped Mr. Griffith's site of all viable economic use. Applying the principles from *Palazzolo* reveals that there was absolutely no reasonable potential use or value remaining in the uplands without a FWP providing for a two-way access road. Indeed, for over eight years, this was the very reason that Mr. Griffith diligently pursued a FWP allowing a suitably wide access road.[7]

Additionally, this Court determined that Rhode Island's Highest Court erred when it held that the final decision requirement of *Williamson County* was not satisfied because the petitioner had not applied for all the other permits necessary to develop the 74 lot subdivision that served as the basis for the damages he sought in his inverse condemnation suit. *Id.* at 2461. The Rhode Island Supreme Court did not explain why it thought this fact significant, but the respondents in *Palazzolo* defended the

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[7] Why else would Mr. Griffith have appealed from the DEP's initial issuance of an overly restrictive FWP?

ruling. *Id.* This Court found the respondents' argument and the lower court's analysis thereof to be unpersuasive. The Court noted that the petitioner had been informed by the Council that he could not fill any of the wetlands; thus, it necessarily followed that the petitioner could not then build 74-single family dwellings in that area. *Id.* The Court concluded that the petitioner's submission of additional applications would not have clarified the extent of development permitted on the petitioner's property, which is the inquiry required under the Court's ripeness decisions.

The foregoing discussion from *Palazzolo* relates directly to the matter currently pending before this Court. The Appellate Division determined that Mr. Griffith had not been deprived of the viable economic use of his land because, aside from lacking an appropriate FWP that would support a major residential subdivision on his upland acreage, Mr. Griffith also lacked a CAFRA permit, an approved wetlands mitigation plan, and other necessary municipal sewer and water approvals for the proposed subdivision. (App. 16-17). The Appellate Division's analysis is contrary to *Palazzolo*; especially so, since the permissible development on Mr. Griffith's land was clear based upon the restrictive FWP issued in June 1992.

It was not necessary for Mr. Griffith to submit a plethora of additional residential subdivision applications after his request for a reasonable FWP was denied because it necessarily followed that if filling a minimal half-acre of wetlands was not allowable to establish two-way vehicular access for a residential subdivision, then any subsequent major subdivision application for the 40 upland acres would have been futile. Petitioner's later-made CAFRA permit and 208 Amendment applications did nothing to further clarify the extent of development that was permissible after the issuance of the restrictive FWP. Inarguably, in the view of this Court, if Mr. Griffith

was unable to procure an appropriate FWP, it was unnecessary for him to submit numerous, futile development applications in order to establish the ripeness of his inverse condemnation claim.

The upland development limitations were clear based upon the DEP's restrictive 1992 FWP. Therefore, the Appellate Division decision, requiring Mr. Griffith to exhaust all other administrative processes prior to filing suit alleging inverse condemnation, is both illogical and inappropriate under the ripeness principles discussed in *Palazzolo* and should be reversed.

CONCLUSION

For these reasons, it is respectfully submitted that the Superior Court, Appellate Division's decision should be reversed. Petitioner entreats the Court to grant this Petition for Certiorari because the questions presented herein clearly beg further resolution, both for this Petitioner and for real property owners in general.

Respectfully submitted,

SEYMOUR J. KAGAN, ESQUIRE
Counsel of Record
CARL W. ERLER, III, ESQUIRE
BERRY, KAGAN, SAHRADNIK, KOTZAS
& RIORDAN
212 Hooper Avenue
P.O. Box 757
Toms River, New Jersey 08754-0757
(732) 349-4800

Counsel for Petitioner
Darwin R. Griffith

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6079-99T5

DARWIN R. GRIFFITH,

Plaintiff-Respondent,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendant-Appellant.

Argued April 24, 2001 – Decided MAY 15 2001

(Filed May 15, 2001)

Before Judges Pressler, Kestin and Alley.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, L-2456-95.

Rachel Horowitz, Deputy Attorney General, argued the cause for appellant (John J. Farmer, Jr., Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel; Ms. Horowitz, on the brief).

Seymour J. Kagan argued the cause for respondent (Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys; Mr. Kagan, of counsel; Carl W. Erler, on the brief).

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

This is an inverse condemnation case involving an alleged regulatory taking. Ultimately, and before entry of final judgment, defendant Department of Environmental Protection (DEP), by way of amelioration pursuant to the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, and more particularly 13:9B-22b, accorded plaintiff Darwin R. Griffith all of the permits and approvals he required in order to develop his property in Little Egg Harbor Township, allowing him to construct a 26-foot road over wetlands and to subdivide the upland portion into forty-three sewered lots. The amelioration also included waiver by DEP of an $80,000 environmental mitigation expense chargeable to plaintiff and waiver of his application fees which would have amounted to an estimated $10,700. DEP now appeals from final judgments and orders of the Law Division, entered after the amelioration was effected, holding that prior to the amelioration, DEP had, by reason of its course of administrative action, temporarily taken the land of plaintiff Darwin R. Griffith; fixing damages for the temporary taking; and awarding plaintiff a counsel fee pursuant to N.J.S.A. 20:3-26c. We reverse both the temporary taking award and the counsel fee award.

This is the fourth time this matter has been before us, and our prior opinions, to which we hereafter refer, recite much of the factual and regulatory background. In sum, the sixty-three acre site, of which twenty-three acres are freshwater wetlands located in a residential zone, is within the Pinelands National Reserve but is not under the development jurisdiction of the Pinelands Commission. Plaintiff had been a part owner of the site as well as

of additional acreage since 1966, but by reason of a partition action concluded in 1984, became the sole owner of this tract, then valued at about $100,000, as well as of several other parcels, two of which he sold shortly after the partition judgment for about one million dollars. Since the site was essentially landlocked, he also obtained, by the partition judgment, an access easement to a public road, Bridge Road, over a tract to the west of the site.

In 1987 plaintiff sought approval from the Army Corps of Engineers for construction of a 26-foot wide road over the wetland portion, leading from a different public road to the uplands portion for which, however, no development application was then being made. DEP advised the Corps that a 26-foot road would be consistent with the State's coastal management plan, provided first, that plaintiff could demonstrate that there was no feasible alternative access to the site, and second, that plaintiff would agree to compensatory environmental mitigation activities. The Army Corps of Engineers never rendered a final decision, apparently because of the adoption of the FWPA, effective in 1988, by which the State assumed the Army Corps' jurisdiction in this regard. *See* N.J.S.A. 13:9B-2. Plaintiff's dealings from that point on were with the DEP.

Various complications then arose during the processing of the Fresh Water Permit (FWP) application, one of the first filed under the then new FWPA. To begin with, DEP became aware of the presence of an endangered species, Pine Barrens tree frogs, on the site, resulting in a wetlands resource reclassification from "intermediate" to "exceptional," a classification which required a greater

buffer or transition area. DEP also learned of the Bridge Road access easement, which it believed could provide feasible alternative access. Finally, there was no submitted development plan for the uplands site demonstrating a public need for the access road that was the subject of the permit application. Accordingly, in 1989 the permit was denied, and plaintiff appealed the denial by way of a contested hearing conducted by the Office of Administrative Law. As the administrative appeal process evolved, it was finally administratively determined that the Bridge Road access was not a feasible alternative because of title problems, and after a further hearing, the resource classification issue was also ultimately resolved in plaintiff's favor.

Finally, on June 25, 1992, the date fixed by the trial judge as the date of taking, DEP issued an FWP permitting the construction of the road but limiting its width to sixteen feet, essentially for the reason that absent a development plan for the uplands, a showing had not been made justifying a wider road. DEP, however, also granted plaintiff leave to seek a major modification of the permit in the future consistent with any later submitted development plan. The permit also required plaintiff to obtain a stream encroachment permit and to submit a mitigation plan in compensation for the environmental disturbance before construction of the road. A further administrative appeal followed, the permit was modified in accordance with plaintiff's request for relocation of the road, and a final decision was issued by DEP for the 16-foot road on May 25, 1994. Plaintiff then appealed to this court from the 16-foot limitation of the FWP and several of its other provisions.

It was not until 1993, that is, after the initial issuance of the restrictive FWP, that plaintiff finally initiated administrative proceedings in order to obtain approval of development of the uplands site under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21. CAFRA was first enacted in 1973 for the purpose of protecting New Jersey's fragile coastal areas by providing development guidelines, to be administered by DEP, for any construction in the coastal area. *See* N.J.S.A. 13:19-2. Pursuant to plaintiff's request, a pre-application conference was held with DEP in June of 1993 at which plaintiff was advised, among other details, that in order for the site to be sewered for development, he would need an amendment to the Ocean County Water Quality Management Plan (WQM). Plaintiff was also advised several months later that the environmental mitigation required of him would probably have to be off-site rather than the less burdensome on-site mitigation earlier proposed. In November 1993, plaintiff submitted his CAFRA application seeking approval for forty-four single-family residences. DEP's initial response to the submission was a pre-application conference clarification letter sent about a week later which raised various problems requiring resolution and which advised plaintiff that CAFRA had been amended that year by L. 1993, c. 190, to be effective the following year. The clarification letter, which was followed by a deficiency letter several weeks later, also advised plaintiff that consistent with the amendment, new implementing rules would further restrict development and that in order to maintain the benefit of the pre-amendment statute and rules, plaintiff's CAFRA application would have to be declared complete for final review

prior to July 19, 1994, the effective date of the amendments.

In January 1994, plaintiff obtained preliminary approval of the required amendment of the WQM Plan from both Little Egg Harbor Township and Ocean County. DEP, however, in May 1994, disapproved the amendment because of its concern about the secondary impacts of extending sewer service to a limited growth area, and because there had been no showing that septic systems would not have been acceptable, thus obviating the need for sewers. In the meantime, DEP's consideration of the CAFRA application went forward, DEP reminding plaintiff of his need to complete the application before the new rules went into effect and requesting various categories of additional information. Plaintiff, however, refused to provide the requested information even after being warned by DEP in September 1994 that his CAFRA application under the original statute and regulations would be canceled if it was not timely forthcoming. Plaintiff nonetheless persisted in his refusal to provide the information, and on December 2, 1994, DEP canceled the CAFRA application for that reason but without prejudice to its resubmission under the new rules. During the following month, plaintiff unsuccessfully sought DEP's reconsideration of its WQM Plan, and on January 30, 1995, he appealed to this court from the CAFRA cancellation, the disapproval of the WQM Plan amendment, and DEP's mitigation requirements.

Although the two appeals were considered separately, we simultaneously issued both opinions on May 24, 1996. In the appeal under Docket Number

A-2667-94T5, we affirmed the CAFRA application cancellation, rejecting plaintiff's argument that completion for review was the date on which it was deemed sufficiently complete to warrant a public hearing, such a hearing having been held here. We thus sustained DEP's contention that it had never declared the application complete and hence that plaintiff was not entitled to the benefit of the prior rules. We also held that DEP had acted properly in refusing to declare the application complete by reason of plaintiff's refusal to submit the required additional information. We further rejected plaintiff's challenge to DEP's denial of approval of the amendment to the WQM Plan for the reason that plaintiff had failed to exhaust his administrative relief. For the same reason, noting further the lack of finality of the Commissioner's decision, we rejected plaintiff's challenge to DEP's disapproval of his proposed on-site mitigation plan. Finally, we concluded that DEP had not unduly delayed its review of plaintiff's plans, at least up until the time the notice of appeal was filed.

The appeal under Docket Number A-6024-93T2 involved the restrictive FWP. We concluded that DEP had been arbitrary in imposing the 16-foot restriction. It was our view that after plaintiff's submission of his CAFRA application on November 15, 1993, a date after initial issuance of the restricted permit but before completion of the administrative process, DEP should have taken into account the nature of the development of the uplands proposed therein and thus reconsidered its rationale that no plans had been disclosed indicating the need for a wider road. We also held that plaintiff should not have been required to apply for a major modification of the

permit in the future since all of the relevant information was already known to DEP. Accordingly, we remanded to DEP for issuance of a permit allowing a road up to thirty feet in width and having a five-year term of viability before expiration. We also noted, by footnote 7 of our opinion, that in view of our direction to DEP to issue a satisfactory permit, it was not necessary for us to comment on plaintiff's contention that the restrictive permit DEP had issued constituted a regulatory taking. In any case, DEP issued a permit satisfactory to plaintiff within several months after our opinion.

On November 6, 1996, several months after issuance of our two opinions, DEP invited plaintiff to submit a new CAFRA application, advising him that because of a 1996 amendment of N.J.A.C. 7:7E-5.4, the site now met the standards for moderate acceptable development intensity, substantially increasing the allowable impervious coverage. DEP expressly then advised him that it would be fruitful for him to pursue the CAFRA process and that a pre-application conference would be arranged. Plaintiff did not respond to that invitation and DEP's development guidance. Indeed, plaintiff initiated no administrative process at all by way either of a new application or an administrative appeal from any prior denials following our two 1996 opinions.

What plaintiff, to the contrary, chose to do was to continue this inverse condemnation action, which he had commenced in July 1995 by a complaint asserting that DEP's actions, starting in 1989, constituted a regulatory taking entitling him to compensation. The action was tried during the summer of 1997 on liability only, and the judge concluded that a taking had occurred on June 25,

1992, the date on which DEP had issued the 16-foot permit despite its issuance of the modified permit in 1996. In any event, as the result of the ensuing judgment entered on February 18, 1998, DEP advised plaintiff in March 1998 that it would permit development of the uplands site for forty single-family homes on sewered lots, subject to its receipt of acceptable grading and construction plans. It also agreed to approve a WQM Plan amendment and to permit, as mitigation, a monetary contribution of $80,000 to the Wetlands Mitigation Council. Various other apparently non-onerous conditions were also set forth. The offer was not accepted.

DEP then filed an appeal from the February 18, 1998, inverse condemnation order, and plaintiff cross-appealed from the fixing of the date of inverse condemnation as of June 25, 1992. Because commissioners had not been appointed, we granted leave to appeal and leave to cross-appeal *nunc pro tunc* to obviate a finality problem in that regard. We issued our opinion under Docket Number A-4260-97T1 on May 3, 1999. We concluded that the trial court's February 18, 1998, judgment was interlocutory for an entirely different reason. We pointed out that N.J.S.A. 13:9B-22b of the FWPA provides that if the court finds that

> issuance, modification, or denial of a freshwater wetlands permit . . . constitutes a taking of property without just compensation, the court shall give the department [DEP] the option of compensating the property owner for the full amount of the lost value, condemning the affected property pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C.20:3-1 et

> seq.), or modifying its action or inaction concerning the property so as to minimize the detrimental effect to the value of property.

We then expressed agreement with *East Cape May Assocs. v. State of New Jersey Dep't of Envtl. Prot.*, 300 N.J. Super. 325, 339-342, (App. Div. 1997), which held, in effect, that the amelioration opportunity thus afforded to DEP is an integral part of the regulatory process and that the State may, by granting amelioration, avoid the risk of having to acquire property by eminent domain. Accordingly, we reversed the trial court's inverse condemnation conclusion as premature since the State had not yet been afforded an amelioration opportunity. We thus remanded to the trial court to provide DEP with a "reasonable opportunity to explore methods to ameliorate plaintiff's alleged loss attributable to the denial of the FWP." *Griffith v. State of New Jersey Dep't of Envtl. Prot.*, No. A-4260-97T1 (App. Div. May 3, 1999). We expressed no further view of the merits of the controversy.

Within one month following our May 1999 remand, DEP advised plaintiff that it would approve upland development by way of an amelioration plan.[1] On July 23,

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[1] We note that the amelioration undertaking by DEP following our 1999 opinion was pursued by it even though we had not yet ruled on the taking issue and, apparently, in order to obviate any doubt that there had been no regulatory taking. We further note that while CAFRA does not have the same amelioration provision as FWPA, we assumed the applicability of that provision because of the intertwining of the FWPA and the CAFRA process, and that assumption was not challenged. In any event, DEP does not in any way repudiate its action, whether characterized as statutory amelioration or voluntary permitting.

1999, in accordance with plaintiff's submission, DEP approved a development of forty-three single-family homes on sewered lots with one storm water detention basin, a new conforming FWP with a five-year term, and waiver by DEP of any monetary mitigation and application expenses. Trial on the remand took place within the next several months, the court concluding that there had been a temporary taking from June 25, 1992, the date of issuance of the restrictive permit, and continuing until September 1, 1999, the date the court found the amelioration – which in fact constituted a complete capitulation by DEP – to have been effective. The judge then fixed just compensation for that temporary taking at $264,850, and later awarded counsel fees and costs in the amount of $251,051.43. DEP appeals.

We address first the taking issue. To begin with, plaintiff has now obtained the approvals and permits necessary for development of the property. The taking, if a taking at all, is hence a temporary taking only. But it is clear that not every deprivation of use resulting from the land-use regulatory process constitutes a compensable taking. We appreciate the doctrinal complexities and competing public policies involved in determining whether a temporary deprivation of use is compensable as an exercise of eminent domain. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3505 (U.S. Jan. 18, 2001) (No. 00-1167). But we are certain that this much at least is clear – normal or at least not unreasonable delays in the land-use permit and approval process as well as extraordinary delays not attributable to government do not constitute temporary compensable

takings. That was the view the United States Supreme Court expressed in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321, 107 S. Ct. 2378, 2389, 96 L. Ed. 2d 250, 268 (1987). And that has been the consistent view of this jurisdiction. *See, e.g., Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n*, 98 N.J. 258 (1985); *Toms River Affiliates v. State of New Jersey Dep't of Envtl. Prot.*, 140 N.J. Super. 135 (App. Div.), *certif. denied*, 71 N.J. 345 (1976); *Meadowlands Reg'l Dev. Agency v. Hackensack Meadowlands Dev. Comm'n*, 119 N.J. Super. 572 (App. Div.), *certif. denied*, 62 N.J. 72 (1972).

As was cogently explained by Judge Brochin in *East Cape May Assocs. v. State of New Jersey Dep't of Envtl. Prot.*, *supra*, 300 N.J. Super. at 342-343, in the context, as here, of an FWPA permit:

> If the end result of the process of applying for development permits is to allow reasonable utilization of the . . . property, the developer will not necessarily be entitled to compensation for the delay between the initial denial of its application and the ultimate issuance of a development permit. The process of applying for a development permit and satisfying the DEP's requirements for its issuance is necessarily protracted. The delay incident to the process, like any other burden of permissible regulation, is a burden inherent in the ownership of property and not a constitutional taking. (Citations omitted.)

In determining the temporary taking issue in the FWPA context, there is, moreover, an additional step of the regulatory process that must be considered, and that

is DEP's right to an opportunity to ameliorate. As further explained by *East Cape May, supra,* 300 N.J. Super. at 340:

> One purpose of N.J.S.A. 13:9B-22b is obviously to avoid exposing the State to the risk of having to acquire property by exercise of the power of eminent domain whenever an application for a development permit is denied. We are obligated to construe the statute to effectuate that purpose. It can and should be effectuated by interpreting the statute to mean that the administrative process leading to the issuance or denial of a development permit is not complete until the State has had the opportunity to decide whether the application of the regulations to a particular property should be relaxed pursuant to N.J.S.A. 13:9B-22b to avoid a taking.

The taking issue before us then is simply this: was there an unreasonable delay fairly attributable to DEP between the date of DEP's issuance of the restrictive FWP in 1992 and its ultimate grant, by way of amelioration, of all the necessary approvals and permits in September 1999? We think it plain, beyond any reasonable dispute of material fact, that this question must be answered in the negative for a variety of reasons.

To begin with, it is evident that the ultimate use of the tract required that all of the necessary permits and approvals be obtained. Plaintiff chose to start with the FWP. That initial application, as we noted in our 1996 opinion, was essentially an abstract one since it was, by plaintiff's choice, unaccompanied by a CAFRA development application which would have indicated the need for a road of a specific width. The permit was initially restricted primarily for that reason, and it was not until

after the administrative appeal from the June 1992 issuance of the restrictive permit was well underway that the CAFRA application was finally filed. In any event, plaintiff cannot be deemed to have been deprived of the viable economic use of his land by reason of the restrictive permit alone since no economic use could have been realistically made until approval of the CAFRA permit. But, most significantly, it was not until this court in its 1996 opinion held that a less restrictive permit should have been issued that DEP's option to ameliorate that restriction under N.J.S.A. 13:9B-22b ripened. The fact of the matter is that DEP effectively extended the regulatory process in a reasonable and statutorily permissible manner by opting promptly thereafter to ameliorate by issuing an FWP in full compliance with plaintiff's road-development application.

Pursuant to R. 2:2-3(a)(2), this court is the forum to which appeals from administrative action must be directed in the first instance. We therefore construe the reference in N.J.S.A. 13:9B-22b to the court determination which triggers the amelioration opportunity as including a decision by this court on appeal from an administrative action alleged to constitute a taking or to be otherwise arbitrary or unreasonable. Plainly, therefore, the administrative process in respect of the FWP was not concluded until an amelioration opportunity was provided to DEP. It exercised its amelioration option and, as a result, plaintiff obtained his desired permit. Beyond that, we are satisfied that appeals from administrative action are in any event sufficiently part of the administrative process

itself as to come within the ambit of reasonable administrative delays which, by definition, do not constitute a taking.

Thus, up until 1996 there was no taking, temporary or otherwise, in respect of the access-road issue. Also in that year, in our opinion in the companion CAFRA case we held that the CAFRA permit was properly canceled by reason of plaintiff's refusal to provide information properly requested by DEP, that a CAFRA permit could be reapplied for, that administrative relief had not been exhausted in respect of the WQM amendment, that there was neither exhaustion nor Commissioner finality in respect of the mitigation challenge, and that there had been up to that point no undue delay by DEP in the administrative process. These holdings, which compel a non-taking conclusion, were, of course, not only the law of the case but binding as well on the trial court. The point, of course, is that up to that time, namely May 1996, there cannot be deemed to have been a regulatory taking, and we so held. Moreover, by that time plaintiff had made the deliberate choice to eschew further resort to the regulatory process and instead to file this action alleging inverse condemnation. In this regard, we deem of particular significance plaintiff's disregard of the communications from DEP shortly after our 1996 opinions were rendered that advised him of the favorable regulatory change, inviting his submission of a new CAFRA application, strongly suggesting that such a submission would be fruitful, and offering to arrange a pre-application conference.

It is not for us, of course, to speculate as to why plaintiff chose instead to continue with this inverse condemnation action. We must, however, conclude that there was then no regulatory taking because plaintiff forewent the invitation to submit its applications. That was the reason for its continued deprivation of use, not any ultimate preclusion imposed by the statute or the implementing regulations or administrative action. We agree with the observation of *MHF Holding Co. v. State of New Jersey Dep't of Envtl. Prot.*, 314 N.J. Super. 87, 96-97 (Law Div. 1997), also an FWPA controversy, that the requirement that a permit be obtained before development does not itself constitute a taking. That indeed is the law of the land. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127, 106 S. Ct. 455, 459, 88 L. Ed. 2d 419, 426 (1985). Consequently, there could have been no taking here, temporary or otherwise, until plaintiff had pursued the available regulatory process to its conclusion. *See MHF Holding Co. v. State of New Jersey Dep't of Envtl. Prot., supra*, 314 N.J. Super. at 98-99. This inverse condemnation action was, simply, premature. Singularly in point is the federal decision in *Walcek v. United States*, 44 Fed. Cl. 462 (1999), in which the court, noting that the test of temporary taking in this context is whether the government is responsible for an extraordinary delay in the regulatory process, *id.* at 467-468, expressly held that plaintiff's exercise of the choice to forego the available administrative application process in favor of an inverse condemnation action defeated its temporary taking claim. As the court there noted:

> the Corps [Army Corps of Engineers] failed to grant the [wetlands] application only because

> plaintiffs did not provide requisite information and state permits. As such, plaintiffs are incorrect in arguing that the Corps temporarily deprived them of the economic use of the property, when the undisputed facts indicate that any such deprivation was due to plaintiffs' own failure to complete the permitting process, as well as their strategic decision to initiate this lawsuit, rather than pursuing the permitting process to a final merits determination.
>
> [*Id.* at 468-469]

Precisely the same can be said of plaintiff here. There was no taking.

We turn now to the counsel fee issue. Counsel fees were awarded pursuant to N.J.S.A. 20:3-26c, which provides in full as follows:

> When a plaintiff shall have brought an action to compel condemnation against a defendant having the power to condemn, the court or representative of the defendant in case of settlement shall, in its discretion, award such plaintiff his reasonable costs, disbursements, and expenses, including reasonable appraisal, attorney and engineering fees actually incurred regardless of whether the action is terminated by judgment or amicable agreement of the parties.

Although the statute does not expressly so require, we are satisfied that the legislative intent must have been, as in the case of other fee-shifting statutes, to permit an award of costs and expenses only to those plaintiffs who prevail, at least in part. It would, in our view, make little sense to require a defendant condemning authority which

is held not to have inversely condemned, to be nevertheless subject to an award of professional fees in favor of a plaintiff who has failed to prove a taking, and, obviously, any such award against a governmental body would be contrary to public policy.

It is, moreover, our view that plaintiff did not prevail and is hence not entitled to a counsel fee award because he failed to show a compensable taking, temporary or otherwise. Our holding on the taking issue is that no temporary taking occurred for at least three reasons: first, there was no unreasonable delay in the regulatory process attributable to DEP; second, DEP forestalled a taking declaration by its conciliatory amelioration, which included all necessary development permits and approvals and a waiver of fees and mitigation costs amounting to almost one hundred thousand dollars; and third, plaintiff's temporary deprivation of use was largely attributable to his own actions including his failure to comply with DEP's request for information on his first CAFRA application, a failure but for which that application might have been granted, as well as his failure to submit a second CAFRA application that had the potential to permit development along the lines he had initially requested. These were his failures, not DEP's.

Nor do we believe that entitlement to an award lies in N.J.S.A. 13:9B-22b. We appreciate that that section speaks literally in terms of a court determination that DEP's challenged action "constitutes a taking," and it is that determination that triggers DEP's amelioration opportunity. Thus the argument might be made that the pre-amelioration taking determination is *ipso facto* sufficient to support the conclusion that plaintiff prevailed in

the inverse condemnation action whether or not an acceptable amelioration followed. We, however, reject that argument. As we explained in *East Cape May Assocs. v. State of New Jersey Dep't of Envtl. Prot., supra,* 300 N.J. Super. at 340-341, that section of the statute must be interpreted as rendering amelioration an integral part of the regulatory process in order to accomplish its statutory purposes of both avoiding DEP's exposure to the risk of having to acquire property by eminent domain and encouraging DEP and the developer to confer about the realistic prospects for development when DEP proposes the imposition of "limits on the utilization of property so draconian that they would amount to a constitutional taking." *Id.* at 341. Consequently, as we there concluded, the statute must be construed as if it read:

> If the court [or the DEP] determines that the issuance, modification, or denial of a freshwater wetlands permit by the department pursuant to this act *would constitute* a taking of property without just compensation, the court shall give the department the option of . . . [*Ibid.*]

Consistent with this rationale, with which we entirely concur, we think it plain that the judicial declaration requiring DEP to exercise one of the options afforded by N.J.S.A. 13:9B-22b does not itself constitute a determination that there has been a taking but only a determination that the challenged agency action *would* constitute a taking if not satisfactorily ameliorated. For this reason, a property owner cannot ordinarily be deemed to have prevailed in an inverse condemnation action in which the result of DEP's exercise of its amelioration opportunity is the granting of development permits sufficient to permit

the owner to enjoy the economic utilization of his property.

In this regard, we perceive a significant difference between amelioration in the context of N.J.S.A. 13:9B-22b and the settlement referred to by N.J.S.A. 20:3-26c that would entitle a property owner to an award of counsel fees. That settlement is an amicable conclusion of the inverse condemnation litigation. Amelioration is, however, a step in the regulatory process which must be concluded before there may be any judicial determination of a taking.[2] In sum, we find an irreconcilable conflict in the proposition that DEP can avoid a taking determination and the financial consequences thereof by post-denial amelioration but that it must at the same time and notwithstanding the amelioration, bear the financial burden of paying the professional fees awardable to a prevailing plaintiff under N.J.S.A. 20:3-26.

Beyond the amelioration considerations, we are also satisfied that this inverse condemnation action was the result of a strategic decision that delayed, if not entirely forestalled, the regulatory process. As we have pointed out, no taking had occurred prior to its institution since at that time the regulatory process was still available to plaintiff. For that reason as well, in view of the favorable result plaintiff obtained through the regulatory process,

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[2] There may be instances in which the Agency's conduct which leads to an amelioration has been so egregiously unreasonable in the circumstances as to justify a temporary-taking conclusion, but for the reasons we have articulated, this is not one of those cases.

he cannot be deemed to have prevailed in the inverse condemnation action.

Because we are satisfied that there was no taking and that the award of counsel fees was improvident, we need not consider DEP's challenges to the just-compensation procedure and methodology employed by the court or its objections to the calculation of the counsel fee.

The judgments and orders appealed from are reversed and we remand to the trial court for entry of an order dismissing the complaint.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-6024-93T2

DARWIN GRIFFITH/
TALL CEDARS,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENERGY, LAND USE REGULATION PROGRAM,

Respondent-Respondent [sic].

FILING DATE

MAY 24, 1996

Argued March 20, 1996 – Decided May 24, 1996.

Before Judges King, Landau and Kleiner.

On appeal from a Final Decision of the Commissioner of the New Jersey Department of Environmental Protection and Energy.

Seymour J. Kagan argued the cause for appellant (Berry, Kagan & Sahradnik, P.C., attorneys; Mr. Kagan, of counsel; Dina R. Khajezadeh, on the brief).

Alyssa Pearlman Wolfe, Deputy Attorney General, argued the cause for respondent (Deborah T. Poritz, Attorney General, attorney for respondent; Mary C. Jacobson, Assistant Attorney General, of counsel; Ms. Wolfe, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Darwin Griffith owns property designated as Block 78, Lot 33, and commonly known as Tall Cedars, in Little Egg Harbor Township, Ocean County. The property is undeveloped and vacant, and is situated along the north side of Nugentown Road. It consists of sixty-three acres, of which approximately twenty-three acres are wetlands. Petitioner appeals from a decision of the Commissioner of the Department of Environmental Protection ("DEP") to restrict his freshwater wetlands permit and water quality certificate by reducing the maximum width of his proposed access road to sixteen feet, and requiring him to apply for a major modification to the permit in order to receive authority to construct a wider road. Petitioner also challenges the issuance and expiration dates of the permit.

We conclude that the decision to impose restrictions in this matter is arbitrary and, accordingly, we reverse. We also conclude that petitioner should be given a five-year period from the termination of this litigation before his permit expires.

I

On August 12, 1988, pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to -30, petitioner submitted an application for an individual freshwater wetlands permit and water quality certificate in order to fill wetlands during construction of an access road from Nugentown Road across the wetlands of his property to the uplands. Petitioner proposed that this access road be a maximum of 500 feet long and twenty-six feet wide.

Petitioner's proposal would have required filling 0.46 acres of wetlands, with the total area of wetlands disturbance limited to 0.47 acres. At the time of his submission, petitioner intended to sell the property for its "fair market value" after obtaining the permit and indicated that the proposed access was "necessary to obtain fair market value for the lot."

From the date of petitioner's application until the issuance on May 25, 1994 of a final decision by the DEP Commissioner, petitioner was engaged in continuous administrative litigation relating to his application. We need not review each step in the administrative process. A brief enumeration is instructive of the substantial difficulty petitioner encountered in the approval process.

On July 19, 1989, the Director of DEP's Division of Coastal Resources denied petitioner's application for an individual wetland permit and water quality certificate because the proposed access road failed to meet three enumerated requirements for the issuance of a permit.

By letter dated August 16, 1989, petitioner requested an administrative hearing to contest the Division's denial, and the matter was referred to the Office of Administrative Law ("OAL"). On motions and cross-motion for summary judgment, the Administrative Law Judge ("ALJ") granted summary judgment to DEP. That decision was appealed to the DEP Commissioner, who reversed and remanded to the ALJ with specific instructions for further inquiry. The ALJ issued an initial decision on remand on August 7, 1991. Petitioner filed exceptions to the initial decision. On December 20, 1991, the DEP Commissioner again remanded the matter to the OAL. While the matter

was pending in the OAL, the DEP and petitioner resolved those issues that had led to petitioner's exceptions. Accordingly, the ALJ entered an order approving the settlement. That order was a final decision, as the Commissioner had consented to the settlement terms.

On June 25, 1992, DEP issued the permit. The permit had an effective date of June 25, 1992 and an expiration date of June 25, 1992. However, the letter from DEP accompanying the permit stated, "This approval is valid for five years. . . . "[1]

The permit also specifically referred to the fact that petitioner had "not proposed any project or development on this site other than an access road." Accordingly, the permit allowed an access road of approximately 500 feet in length and sixteen feet in width (with no shoulders), rather than the twenty-six feet wide roadway that had been originally requested.

In addition, the permit required: (1) a relocation of the roadway in order to reduce the amount of wetlands disturbed (from 0.47 acres to 0.25 acres);[2] and (2) petitioner to apply for a major modification to the permit in the event that future development on the uplands necessitated a wider road. As to this later requirement, the permit specifically stated:

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[1] We presume that the June 25, 1992 expiration date is the result of a typographical error on the part of the DEP. The five-year term of approval referenced in the accompanying letter suggests that the true expiration date is June 25, 1977.

[2] This condition was later removed in the administrative appeal process.

> If the permittee, in the future, receives all the required approvals for development of sufficient size on the upland of lot 33, the permittee may apply for a major modification of this permit for a wider access road. However any proposed modification will have to be in compliance with the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A) to receive approval.

Various physical and administrative conditions were also listed in the permit, including the requirement that petitioner submit a mitigation plan prior to the commencement of any construction and receive written approval of that plan.

Finally, the permit specifically referred to its validity in two places. First, General Condition 6 stated:

> This permit does not waive the obtaining of Federal or other State or local government consent when necessary. This permit is not valid and no work shall be undertaken until such time as all other required approvals and permits have been obtained.

The permit itself stated:

> This permit is NOT VALID until the permit acceptance form has been signed by the applicant, accepting and agreeing to adhere to all permit conditions, and returned to the Land Use Regulations Program. . . .

By letter dated July 15, 1992, petitioner requested an adjudicatory hearing to contest five conditions in the permit. Two of these challenges were pertinent to this appeal: (1) the permit's termination and effective dates; and (5) the requirement that petitioner apply for a major

modification if future development in the uplands was approved.[3]

In regard to his fifth objection, petitioner suggested that the permit's language be changed to the following:

> In the future event that the permittee receives the mandated approvals for a major subdivision on the uplands of Lot 33, and that approval requires an access road having a cartway width exceeding 16 feet, but not exceeding 30 feet, the permittee need not apply for further modification of this Freshwater Wetlands permit in order to acknowledge the ultimately approved road width. The mitigation requirements shall remain as stated under Administrative Condition 4.[4]

Petitioner argued that, "assuredly," either he or some succeeding owner

> will obtain a major subdivision approval for the approximate 40 acres of uplands lying within its 63 total acres. Since such an approval has not yet been obtained, the Department insists that

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[3] Those challenges denominated "2," "3," and "4" were resolved at further administrative proceedings and are not challenged in this appeal.

[4] Administrative Condition 4 read:

> Prior to the commencement of any construction in freshwater wetlands, the applicant shall submit a mitigation plan to this office and receive written approval. The plan shall demonstrate compliance with requirements for wetland mitigation noted at N.J.A.C. 7:7A-14.1 et seq. The permittee, Darwin R. Griffith[,] shall be responsible for monitoring this mitigation and the success of the mitigation plan. The mitigation must be carried out prior to or concurrently with the road project.

> this entire parcel must be limited to single family residential usage and thus has provided for only a sixteen foot wide cartway. The Department's position contravenes the obviously practical use of the property for a major subdivision.

Petitioner contended that, having spent four years attempting to get a permit, it would be unreasonable for DEP to subject him to further procedural process "which merely effectuates a modification that is already foreseen in the near future."

Petitioner's challenge was again referred to the OAL. DEP moved for a summary judgment and petitioner cross-moved for summary judgment. In his supporting papers, petitioner explained that the proposed twenty-six-foot-wide access road was "designed to conform to the requirements set forth in the Township of Little Egg Harbor Land Use Ordinance which, among other things, requires a minimum cartway width of 30 feet for a street in a residential subdivision."[5] Petitioner then declared, "[A]s the development of Petitioner's property as a major subdivision is in fact a reality . . . the location and width

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[5] Section 15-8.27(o)(4) of the Township of Little Egg Harbor Land Use Ordinance requires, unless otherwise indicated on the master plan or the official map, a two-way pacing width of thirty feet for a minor residential street and a two-way pacing width of forty feet for a neighborhood collector street.

Petitioner's brief does not adequately explain the difference between the minimum width required in the applicable ordinance and petitioner's application for a twenty-six foot wide cartway. We presume that the balance of the thirty feet required width will be road shoulders.

of the access road should be designed in conformance with the Township's subdivision requirements."[6]

In response, DEP contended that it could not issue the requested permit, as petitioner had failed to submit the specifics of his subdivision project as part of his initial application.

The ALJ granted summary judgment to DEP. The ALJ explained in his ruling that petitioner only asked for "a permit for an access road and not a permit for an access road for a major subdivision." The ALJ also concluded that DEP had followed the mandate of the controlling statute and allowed for the least invasive means of impact on the wetlands while granting petitioner's proposed access road. The ALJ noted, "The mandate is to reduce the amount of impact, and [DEP] does this while allowing petitioner to still build the access road, achieving a balancing of petitioner's property interest rights and the environmental mandate of the Freshwater Wetlands Act."

Undoubtedly, the ALJ focused on N.J.S.A. 13:98B-9(b), which provides that the DEP

> shall issue a freshwater wetlands permit only if it finds that the regulated activity:
>
> . . . .

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[6] On or about November 15, 1993, petitioner filed an application for a permit under the Coastal Area Review Facility Act (CAFRA), N.J.S.A. 13:91-1 to -21, in order to construct a forty-four unit single-family major subdivision on his property. That application was denied and the denial is presently before this court in a separate pending appeal, Docket No. A-2667-94T5.

> (2) Is nonwater-dependent and has no practicable alternative . . . which would not involve a freshwater wetland or which would have a less adverse impact on the aquatic ecosystem, and which would not have other significant adverse environmental consequences; and
>
> (3) Will result in minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of the freshwater wetland; and
>
> . . . .
>
> (9) Is in the public interest . . . , is necessary to realize the benefits derived from the activity, and is otherwise lawful.

See also N.J.A.C. 7:7A-3.5(a) (corresponding regulation). In addition, under N.J.S.A. 13:9B-13(a), DEP "shall require as a condition of a freshwater wetlands permit that all appropriate measures have been carried out to . . . minimize the area of freshwater wetland disturbance."

The initial decision of the ALJ, as modified by a settlement on three of petitioner's five challenges, was adopted by the Commissioner as a final decision on May 25, 1994 with one further modification.

The original permit had required petitioner to apply for a major modification at some future date after he had received all of the necessary approvals for the upland development. The Commissioner, however, found no authority for requiring petitioner to first obtain such approvals before applying for a major modification. Therefore, he directed DEP to change the language of the

permit in order to allow petitioner to apply for a major modification at any time and, if approvable under the Freshwater Wetlands Protection Act, to receive that modification. The Commissioner noted, nevertheless, that any such major modification "shall be issued with the condition that construction on an access road wider than 16 feet may commence only after [petitioner] has obtained all necessary approvals for its proposed development of a major subdivision."

The Commissioner also directed DEP to change the effective date of the permit to read "upon satisfaction of all conditions precedent" and to change the expiration date of the permit to June 27, 1995. Additionally, the Commissioner concluded:

> There is no basis, however, for Tall Cedars' contention that the Permit should provide for a term of five years from its *effective* date. While N.J.A.C. 7:7A-13.3 provides that permits are effective for a fixed period *not to exceed five years*, the provision does not require that they be effective for a full five years from their effective date. The Department is authorized to issue permits with effective periods of less than five years. Accordingly, the Department has the authority, as it has done in this case, to issue a permit for five years duration from its date of issuance.

The primary contention of petitioner in this appeal is that the DEP's permit condition restricting the width of his proposed access road to sixteen feet is arbitrary, capricious, and unreasonable. Petitioner secondarily contends that the refusal to issue a permit for a term of five years

from the conclusion of this litigation was also arbitrary under the circumstances of this application.

II

N.J.S.A. 13:9B-9(a) requires an application to include "a written description of the proposed regulated activity" and "any information necessary for the department to make a finding." Petitioner initially filed his application on August 12, 1988. His application indicated an intent to sell the property for its "fair market value." Petitioner first revealed his intent to market the property as a major subdivision on July 15, 1992, when challenging the permit conditions. Petitioner did not submit a plan for a proposed major subdivision containing the development of forty-four lots until November 15, 1993, when filing a CAFRA permit application. The Commissioner's final decision is dated May 25, 1994.

Clearly, the Commissioner was aware of the Little Egg Harbor Township Ordinance, which requires a thirty-foot cartway width for roads associated with a major subdivision. Once the CAFRA application was filed on November 15, 1993, a final decision should have included an evaluation of the major subdivision plan as detailed in the CAFRA application and not limited by the wording of petitioner's original application.

Decisions on petitioner's original application appear to have been modified on several occasions as a result of negotiations and/or as a result of ALJ decisions. Since petitioner's application appears to have been continuously reviewed and modified, we cannot understand why information pertinent to petitioner's need for a wider

access road, made evident by the CAFRA application, could not be considered by the Commissioner in his final decision. This is particularly so since petitioner has not yet been permitted to commence construction. We cannot sanction a final decision that fails to consider the detailed information provided in the CAFRA application that had been filed six months earlier.

An administrative determination may be upset if it is affirmatively shown to be arbitrary, capricious or unreasonable. *Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980). In reviewing agency action, a court's obligation is to determine whether the agency violated its enabling act's express or implied legislative policies, whether there was substantial evidence in the record to support the agency's findings, and whether the agency clearly erred by reaching a conclusion that could not reasonably have been made after weighing the relevant factors. *Public Serv. Elec. & Gas Co. v. New Jersey Dep't of Envtl. Protection*, 101 N.J. 95, 103 (1985).

In exercising those review powers, our courts traditionally defer to an agency's expertise in cases involving technical matters within the agency's special competence. *New Jersey Chapter of the Nat'l Ass'n of Indus. & Office Parks v. New Jersey Dep't of Envtl. Protection*, 241 N.J. Super. 145, 165 (App.. Div.), *certif. denied*, 122 N.J. 374 (1990); *New Jersey Bell Tel. Co. v. State, Dep't of Public Utils.*, 162 N.J. Super 60, 77 (App. Div. 1978). In fact, this presumption of reasonableness of agency action is even stronger in cases in which the agency "has been delegated discretion to determine the specialized and technical procedures for its tasks." *Newark v. Natural Resource Council, Dep't of Envtl. Protection*, 82 N.J. 530, 540, *cert. denied*, 449 U.S. 983, 101

S. Ct. 400, 66 L.Ed.2d 245 (1980). As such, our courts will not substitute their judgment as to the wisdom of an administrative action as long as the action is statutorily authorized and is not unreasonable. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562-63 (1978).

The Commissioner's decision not to review petitioner's application as inclusive of the separately, albeit subsequently, filed data concerning his need for a wide access road does not fall within the ambit of a technical matter within the agency's special competence. *See New Jersey Chapter of the Nat'l Ass'n of Indus. & Office Parks v. New Jersey Dep't of Envtl. Protection, supra*, 241 N.J. Super. at 165; *New Jersey Bell Tel. Co. v. State, Dep't of Public Utils., supra*, 162 N.J. Super. at 77. This decision contradicts the final modification that the Commissioner made to the ALJ decision, wherein the Commissioner directed DEP to change the language of the permit to allow petitioner to apply for a major modification at any time and, if approvable under the Freshwater Wetlands Protection Act, to receive that modification.

If petitioner could apply for a major modification *at any time*, there is no explainable reason to decline to review the application then under consideration in light of the data provided in the CAFRA application, which detail the need and engineering specifics relative to a twenty-six-feet wide access road. We conclude that the Commissioner should have adopted petitioner's proposed language:

> In the future event that the permittee receives the mandated approvals for a major subdivision on the uplands of Lot 33, and that approval requires an access road having a cartway width

> exceeding 16 feet, but not exceeding 30 feet, the permittee need not apply for further modification of this Freshwater Wetlands permit in order to acknowledge the ultimately approved road width. The mitigation requirement shall remain as stated under Administrative Condition 4.

III

Petitioner contends that the Commissioner erred in effectuating a permit with issuance and expiration dates of June 25, 1992 and June 25, 1997 respectively. He asks that we modify the issuance date of this permit to coincide with the date of our opinion and to modify the permit's expiration date to a date five years from the date of our opinion.

The petitioner correctly noted that N.J.A.C. 7:7A-14.1(e) provides that a permit will not become effective until the deed restriction executed in connection with a wetlands mitigation plan is registered with the county clerk. "Since the required deed restriction for areas subject to wetlands mitigation has yet to be recorded, the Permit is not yet effective."

The Commissioner additionally commented:

> Any inability of the permittee to make use of the full five years from the date of issuance, because it must first satisfy conditions before the permit is valid or effective, is within the control of the permittee, not the Department. To carry Tall Cedar's [sic] argument to the extreme, if the Department were to issue the Permit valid for a full five years from its effective date as requested by Tall Cedars, Tall Cedars could

> maintain the permit for decades merely by failing to satisfy just one condition precedent to its effectiveness. Accordingly, it is both legal and reasonable for the Department to issue the permit with an expiration date five years from the date of issuance. Tall Cedars may maximize the period of effectiveness of the Permit by expeditiously satisfying all conditions precedent to its effectiveness.

We concur with the Commissioner. However, the expiration date must be modified, however, to accommodate the delays occasioned by this litigation. There appears to be no statutory or regulatory provision that would prohibit an expiration date five years from the conclusion of this litigation.

In light of our reversal, petitioner's application must be remanded to the Commissioner for issuance of a permit incorporating petitioner's proposed language quoted *ante* pertinent to access road width, which permit, when issued, will expire five years thereafter.

Reversed.[7]

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[7] Based upon our decision, we need not comment on petitioner's contention that DEP's refusal to issue a reasonably conditioned permit for his requested access is tantamount to a taking of property without just compensation in violation of the Federal and State Constitutions.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
A-2667-94T5

DARWIN GRIFFITH/TALL CEDARS,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, LAND USE REGULATION PROGRAM,

Respondent-Respondent [sic].

Argued March 20, 1996 – Decided May 24, 1996.

(Filed May 24, 1996)

Before Judges King, Landau and Kleiner.

On appeal from a Final Decision of the Commissioner of the New Jersey Department of Environmental Protection and Energy.

Seymour J. Kagan argued the cause for appellant (Berry, Kagan, Sahradnik & Kotzas, P.C., attorneys; Mr. Kagan, Of counsel; Dina R. Khajezadeh, on the brief).

Elizabeth Wolfe, Deputy Attorney General, argued the cause for respondent (Deborah T.

Poritz, Attorney General, attorney for respondent; Mary C. Jacobson, Assistant Attorney General, of counsel; Alyssa L. Pearlman, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Darwin Griffith owns property designated as Block 78, Lot 33, and commonly known as Tall Cedars, in Little Egg Harbor Township, Ocean County. The property is undeveloped and vacant, and is situated along the north side of Nugentown Road. It consists of sixty-three acres, which approximately twenty-three acres are wetlands. This matter involves an appeal of several decisions by the Department of Environmental Protection (DEP) concerning a major subdivision proposed by petitioner. Specifically, petitioner appeals: (1) the cancellation of a permit application that he filed under the Coastal Area Facility Review Act ("CAFRA"), N.J.S.A. 13:19-1 to -21, after DEP (specifically, the manager of the Bureau of Coastal Regulation) claimed that he had failed to submit the additional information necessary to deem the application complete for final review; (2) the disapproval of an amendment that he proposed to the Ocean County Water Quality Management Plan; and (3) the rejection of the proposed on-site mitigation plan that he filed with a freshwater wetlands permit application, and the agency's failure to classify certain freshwater wetlands on his property.

After careful review, we affirm the DEP's cancellation of petitioner's CAFRA permit application. We dismiss petitioner's challenge to the disapproval of an amendment to the water quality management plan amendment,

and we likewise dismiss petitioner's challenge to the mitigation plan as not ripe for adjudication.

I

On August 12, 1988, petitioner submitted an application for an individual freshwater wetlands permit and water quality certificate in order to fill wetlands during construction of an access road from Nugentown Road across the wetlands of his property to the uplands. As a component of that application, petitioner filed a mitigation plan. After several contested administrative proceedings, a wetland permit and water quality certificate ultimately was issued, subject to several conditions.[1]

On or about November 15, 1993, petitioner filed an application for a CAFRA permit in order to construct a forty-four-unit, single-family major subdivision on his property. Five months prior to filing his CAFRA permit application, petitioner met with DEP representatives to discuss the CAFRA regulations applicable to this intended application, particularly N.J.A.C. 7:7E, entitled Coastal Zone Management. These discussions were memorialized by the DEP in a letter to petitioner dated August 9, 1993. Petitioner and DEP exchanged additional correspondence, including a letter dated November 22, 1993.

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[1] Petitioner appealed from the final decision of the DEP Commissioner. That appeal is presently pending disposition before this court under Docket No. A-6024-93T. Petitioner's motion to consolidate both appeals was denied but the appeals were placed on the same disposition calendar.

In the November 22 letter, the DEP specifically informed petitioner that the guidance it had provided to petitioner was only valid until July 19, 1994, when new legislative amendments to CAFRA and new regulations effectuating those legislative amendments were to become effective. Petitioner was told that if he planned on having his CARFA [sic] application reviewed under the current regulatory scheme, it had to be declared "Complete for Final Review" prior to July 19, 1994, "or be subject to the new rules."[2]

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[2] In July 1993, the Legislature amended CAFRA, effective July 19, 1994 (with limited exceptions). L. 1993, c. 190. The Assembly Environment Committee's statement declared that the amended statute would "tighten existing regulatory thresholds for the issuance of permits pursuant to CAFRA, and would provide enhanced protection of water quality, habitat and wildlife within these areas of increased regulatory review." Assembly Environment Committee Statement, No. 1475-L. 1988, c. 190 at N.J.S.A. 13:19-2. The Legislature also required DEP to adopt regulations within one year of implementing these amendments to CAFRA. N.J.S.A. 13:19-17.

Accordingly, on February 22, 1994, in order to implement the new legislation, DEP proposed many amendments and new rules to N.J.A.C. 7:7E. 26 N.J.R. 943. These regulatory changes were effective on July 18, 1994, and were operative on July 19, 1994. 26 N.J.R. 2990. In related rulemaking, DEP also amended the Coastal Permit Program Rules, N.J.A.C. 7:7, which rules established the procedures by which DEP reviewed CAFRA permit applications. 26 N.J.R. 918; 26 N.J.R. 2934.

Thereafter, all of the regulations in section 7:7E were readopted without change on June 22, 1995, and they are set to expire on June 23, 2000. 27 N.J.R. 2738-39. The Coastal Permit Program Rules in section 7:7 were also significantly amended and new rules were established effective October 16, 1995. 27 N.J.R. 2976.

In December 1993, petitioner's CAFRA application was deemed "acceptable for filing." Thereafter, on January 6, 1994, as part of its general review process, the DEP sent petitioner's application to other state agencies for comments. Various agencies submitted comments and, utilizing those comments, the DEP sent petitioner a letter identifying several deficiencies in the application. In particular, the DEP requested that petitioner:

> 1. Show on the site plan, all proposed grading and vegetation clearing for the entire site.
>
> 2. Show on the site plan, all municipal set back requirements, sidewalks, house and driveway locations for all of the proposed 44 lots. . . .
>
> 3. In plan form, submit details of the entire stormwater management facilities proposed. . . .
>
> 4. In plan form, submit details of the entire proposed on-site and off-site sanitary sewerage system, man holes, gravity pipes and bedding. . . . Please be advised that the project site is located outside of the approved Water Quality Management Plan (208), [and] as a result the Program *can not* approve a CAFRA permit application until this site is included in the 208 Plan. Amending the 208 Plan can be a lengthy process; provide documentation as to the status of the proposed amendment. This information is required so the Program can assess compliance with Water Quality and Secondary Impact Rules.[3]

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[3] A 208 plan refers to an areawide waste water treatment management plan, 33 U.S.C.A. § 1288, and will be discussed in greater detail, *infra*.

5. Provide details of the proposed water main construction.

6. Provide a cross-section of the proposed roadway and side walk construction. Provide documentation demonstrating the need for a 30 feet wide roadway when the Program has traditionally required 28 feet wide roadway widths for non collector roads in this region. . . .

. . . .

7. Provide a soil erosion and sediment control plan.

8. Provide a landscaping plan.

9. For the off-site construction along Nugentown and Giffordtown Roads, show the exiting edge of pavement, woody vegetation and the proposed limits of disturbance, and proposed restoration.

In response, petitioner sent a revised plan but refused to include all of the information requested by DEP. Petitioner, among other things: (1) declined to provide grading on the site plan; (2) stated that the information requested on the stormwater management facilities was "premature;" (3) concluded that the requested pump station and sewer design details would provide no added meaningful input to the CAFRA process; (4) declined to provide construction details on the proposed roadway and sidewalk, and (5) stated, without support, that the landscaping plan would conform to Soil Conservation Survey standards. Petitioner stated in his letter dated February 14, 1994:

> [T]he information presently being requested appears to exceed that which should suffice and

> in many instances addresses factors which normally await possible consideration subsequent to input from the public hearing and from the NJDEPE's Preliminary Staff Analysis. Currently judging whether this application is "complete for filing" seems the more proper administrative sequence and would promote the public hearing phase.
>
> . . . .
>
> After review, of these materials, and upon completion of the public hearing and Staff Analysis, the NJDEPE has ample opportunity to pursue reasonable requests for additional information concerning either the plan or EIS.

On March 2, 1994, DEP found petitioner's application "sufficient at this time for consideration by the Administrator" and "complete for public hearing." A public hearing was scheduled for April 15, 1994.

In conjunction with the hearing, DEP issued its Staff Preliminary Analysis in April 1994. DEP detailed all of the CAFRA regulations or policies implicated by petitioner's application and outlined the information that DEP needed to determine whether petitioner's proposed subdivision was in compliance with that CARFA [sic]. In that "informal initial appraisal" of petitioner's application, DEP stated clearly that petitioner could not receive a permit without presenting additional information. DEP specifically stated, "Please be advised that Amendments to CAFRA are scheduled to take effect on July 19, 1994. If this application is not declared complete for review prior to that date this application may be subject to any adopted Rule revisions or new Rules applicable to this project."

On July 15, 1994, petitioner sent DEP his response to the Staff Preliminary Analysis, explaining his refusal to provide some of the information requested by DEP. In the accompanying letter, petitioner wrote, in part:

> [T]he data submitted herewith is sufficiently detailed to satisfy any reasonable review under the current relevant rules and should produce an approval of the project. Any outstanding issues which the NJDEPE has previously raised are relatively minor and can be accommodated as permit conditions. Therefore, it is the applicant's position that [DEP] should declare this application complete for review under the rules which are applicable prior to July 19, 1994.

On July 29, 1994, DEP responded to petitioner's July 15, 1994 letter. DEP again asked petitioner to submit additional information, noting that the following deficiencies, as originally outlined in the Staff Preliminary Analysis, continued to exist: (1) failure to submit a grading plan showing all steep slopes (which prevented DEP from determining compliance with the steep slopes policy in N.J.A.C. 7:7E-3.32); (2) failure to provide details on how the proposed sewer system would be restricted for use by this project only and failure to address the impacts from off-site development (which prevented DEP from determining compliance with the secondary impacts policy in N.J.A.C. 7:7E-6.3); (3) failure to submit a complete set of construction plans or grading plans, to address stormwater management or water quality control for parts of the roadway, to document how the proposed stormwater system will be maintained, and to locate stormwater outfall structures near existing slope bottoms (which prevented DEP from determining compliance

with the stormwater runoff policy in N.J.A.C. 7:7E-8.37); (4) failure to provide details of plant installation for soil stabilization (which prevented DEP from determining compliance with the vegetation policy in N.J.A.C. 7:7E-8.8); and (5) failure to adequately address buffers and compatibility of uses (which prevented DEP from determining compliance with the buffer policy in N.J.A.C. 7:7E-8.13).

By letter dated August 9, 1994, DEP thereafter informed petitioner that his pending and incomplete CAFRA application would be governed by the amended CAFRA regulations, effective July 19, 1994, since petitioner's application had yet to be declared complete for final review. Although petitioner responded to the letter dated August 30, 1994, he continued to insist that the additional information requested by DEP was unnecessary.

On September 20, 1994, DEP again reminded petitioner of his application deficiencies. DEP warned petitioner that if he did not sent this information within thirty days, "thsi application will be cancelled pursant [sic] to N.J.A.C. 7:7-4,6(d)." Petitioner responded by again stating his belief that "the additional information being requested is unnecessary."

On December 2, 1994, DEP (specifically, the Manager of the Bureau of Coastal Regulation) cancelled petitioner's CAFRA permit application "due to [his] failure to submit the additional information requested . . . on July 29, 1994, August 9, 1994 and September 20, 1994." DEP also told petitioner that he could submit a new application, but that this new application had to demonstrate

compliance with the new rules as amended on July 18, 1994.

II

During DEP's initial review of petitioner's CAFRA permit application, the agency advised petitioner that his proposed project site was located outside of the approved sewer service area in the Ocean County Water Quality Management ("WQM") Plan. Accordingly, the agency informed petitioner that if he wanted his proposed subdivision serviced by a sanitary sewer system, he would have to apply for an amendment to the existing plan pursuant to N.J.A.C. 7:15-3.4.

On January 26, 1994, petitioner submitted an application to DEP for an amendment to the Ocean County WQM Plan in order to incorporate his property into the designated sewer service area. *See* N.J.A.C. 7:15-3.4(g)(9), (10). This application requested expansion of the Little Egg Harbor Township Municipal Utility Authority ("LEHTMUA") sewer service area to petitioner's proposed development. An on-site gravity collection system and sewage pump station/force main would be used to discharge a total of 13,200 gallons per day of wastewater into an existing LEHTMUA collection system to the Southern Ocean County Water Pollution Control Facility in Stafford Township for treatment. Discharge from that facility was to the Atlantic Ocean.

The Ocean County Planning Board supported petitioner's incorporation into the designated sewer service

area. On December 14, 1993, prior to petitioner's submittal, LEHTMUA had granted preliminary approval to petitioner for a comprehensive sanitary sewer collection system to serve the proposed development.

On February 7, 1994, DEP's Office of Land and Water Planning (now known as the Bureau of Water Planning) distributed petitioner's proposed amendment to the Ocean County WQM Plan to various other sections of DEP for comments. On May 5, 1994, based upon these concerns and the comments that it received, DEP disapproved petitioner's proposed amendment for the following reasons: (1) the project site was located within a limited growth region on a relatively undisturbed site and sewering the proposed subdivision would allow for a higher development on-site than if individual septic systems were used (which was generally discouraged); (2) a portion of the project site was located in the Pinelands National Reserve Rural Development Area and "should not be designated as a sewer service area as sewer service would only be permitted in this designation to correct an existing public health hazard;" (3) the project site was located in an area designated as an "Environmentally Sensitive Planning Area" in terms of the State Development and Redevelopment Plan, which designation encouraged limited growth; (4) the project site was surrounded by wetlands, which required petitioner to obtain a grant condition waiver or revised mapping approval before connecting the proposed project to the LEHTMUA collection system, since that system was constructed with grant monies that contained wetlands grant-condition restrictions; and (5) the project would result in expansion of the existing sewer service area, which would require

an environmental assessment for a discharge allocation certificate consistent with N.J.A.C. 7:14A-10.4.

On May 12, 1994, petitioner responded by stating that an environmental assessment was not necessary for this project since the proposed project did not include any proposed new discharge that mandated a discharge allocation certificate. On May 18, 1994, despite DEP's rejection of its amendment request, petitioner submitted a revised application for an amendment to the WQM Plan.

In his submission, petitioner: (1) claimed that a CAFRA application was currently under review by DEP and that available information indicated that the proposed development intensity would be allowable; (2) redesigned his project so that all of the proposed development would be located in the Pinelands National Reserve Regional Growth Area and not in the Pinelands National Reserve Rural Development Area; (3) claimed that he had requested a waiver to the grant condition and a mapping revision from the Municipal Wastewater Assistance Program; (4) submitted an environmental assessment to the Bureau of Watershed Permitting; and (5) resubmitted a copy of LEHTMUA's resolution granting preliminary approval to petitioner for a comprehensive sanitary sewer collection system to serve the proposed development. Petitioner did not discuss the State Development and Redevelopment Plan. However, petitioner did request that his original amendment application be further changed to reflect an increase in sewerage capacity for two additional dwellings.

After petitioner's proposed amendment was submitted to various other sections of DEP for comment, DEP's

Municipal Wastewater Assistance Program granted petitioner's request for a mapping revision, determining that his proposed development did not infringe upon wetlands.

Petitioner's proposed amendment request was disapproved in January 1995, based upon the cancellation of petitioner's CAFRA permit application.[4]

III

In June 1988, in conjunction with his application for a freshwater wetlands permit to construct an access road to his uplands, petitioner submitted a wetlands mitigation plan. In this plan, petitioner proposed to clear forested uplands adjacent to the proposed access road and to create freshwater wetlands by planting a swamp consisting of Atlantic White Cedars.[5]

A freshwater wetlands permit was issued to petitioner on June 25, 1992. This permit was conditioned

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[4] On January 27, 1995, petitioner filed a notice of appeal from DEP's cancellation of its CAFRA permit (discussed in part one of this opinion) and DEP's denial of petitioner's application for an amendment to the Ocean County Water Quality Management Plan.

[5] On June 6, 1988, new freshwater wetlands regulations became effective. 20 N.J.R. 1235. These regulations became operative on July 1, 1988, and require that a proposal for mitigation include, among other things, a site plan showing existing and proposed elevations and grades of the project shown in one-foot intervals, and plan views and cross-sectional views. N.J.A.C. 7:7A-14.4(a)(1)-(11).

upon the submission by petitioner of an acceptable mitigation plan that complied with the requirements for wetland mitigation at N.J.A.C. 7:7A-14.1 to -14.6.

During DEP's pre-application review of petitioner's CAFRA permit application, DEP provided non-binding "informal guidance" to petitioner on the freshwater wetlands issues relevant to the proposed project pursuant to N.J.A.C. 7:7E-3.27 and 3.28. On August 9, 1993, DEP told petitioner that the proposed mitigation area "will most likely need to be moved off site to avoid the destruction of mature upland forest to create wetlands." DEP also told petitioner that he might be required to apply for a major modification to the June 25 permit if additional wetlands disturbance occurred and that he would have to submit an endangered and threatened species report for the site to enable DEP to determine the appropriate wetlands buffer.

In response, petitioner asked for

> confirmation that the location of any proposed wetland mitigation will be first dictated by the regulation [N.J.A.C. 7:7A-14.3(a),] which states that "all mitigation projects shall be carried out on-site to the maximum extent practicable." Unquestionably, requiring off-site mitigation based solely on the premise that existing upland trees cannot be removed can create further unnecessary and unrealistic hardships. Therefore, prior to considering a need to evaluate options for off-site mitigation, it logically follows that "real" opportunities for off-site mitigation must exist. The requirements of conducting an exhaustive off-site search, purchasing additional property, and the mitigation

itself almost always will prove to be an unnecessary hardship, when compared to the potential for on-site mitigation.

On November 22, 1993, in response to petitioner's letter, DEP further clarified its position. Specifically, DEP told petitioner that his wetlands mitigation plan was not in compliance with N.J.A.C. 7:7A-14.2(a)(2)(i) and (a)(2)(ii). that is, petitioner's plan was "unacceptable," since: (1) it would requíre the removal of a mature upland forest area, which was discouraged by N.J.A.C. 7:7A-14.2(a)(2)(i); and (2) it could not provide the appropriate transition area required by N.J.A.C. 7:7A-14.2(a)(2)(ii), because the intended access road was proposed directly adjacent to the submitted mitigation area.

DEP also advised petitioner that he could either apply to the agency for a Letter of Interpretation delineating the wetlands on the site or allow the agency to verify those wetlands during its review of petitioner's CAFRA permit application.

By letters dated December 21, 1993 and May 12, 1994, petitioner continued to dispute the agency's stand on his mitigation plan and its decision regarding verification of the wetlands. Petitioner also sent to the agency diagrams illustrating optional development lots in the location of the proposed mitigation area.

On August 9, 1994, the Principal Environmental Specialist of DEP's Bureau of Coastal Regulation wrote to petitioner and stated that his mitigation plan was "impracticable" and "not acceptable" for the following reasons:

1. The proposed mitigation area is in a forested upland condition. The Freshwater Wetland Act Rules (N.J.A.C. 7:7A-14.2(a)2i) discourages the creation of wetlands from existing climax habitats.[6]

2. The proposed mitigation site has not provided an appropriate transition area as required by the Rules (N.J.A.C. 7:7A-14.2(a)2iii).

3. The proposed mitigation site is not suitable for the establishment of Atlantic White Cedar.

DEP directed petitioner to search for an off-site location within the same watershed and if this was unavailable, to proceed to the Mitigation Counsel. In addition, DEP notified petitioner that, based upon site inspections by the agency's staff, the wetlands delineation in his CAFRA permit application was "accurate."[7]

IV

Petitioner contends that the DEP's decision to cancel his CAFRA permit application, its decision disapproving his proposed amendment to the Ocean County WQM Plan, and its decision disapproving his mitigation plan were arbitrary, capricious and unreasonable and should

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[6] "Climas habitat" means a mature, well-developed natural ecological community. N.J.A.C. 7:7A-1.4.

[7] Petitioner did not heed DEP's directive. Instead, petitioner referenced the "disapproval" of his mitigation plan in his case information statement filed in this appeal, although he did not specifically mention in his notice of appeal that he was appealing from the DEP's disapproval of the mitigation plan.

therefore be reversed. *See Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980).

In reviewing agency action, our obligation is to determine whether the agency violated its enabling act's express or implied legislative policies, whether there was substantial evidence in the record to support the agency's findings, and whether the agency clearly erred by reaching a conclusion that could not reasonably have been made after weighing the relevant factors. *Public Serv. Elec. & Gas Co. v. New Jersey Dep't of Envtl. Protection*, 101 N.J. 95, 103 (1985).

In exercising those review powers, we traditionally defer to an agency's expertise in cases involving technical matters within the agency's special competence. *New Jersey Chapter of the Nat'l Ass'n of Indus. & Office Parks v. New Jersey Dep't of Envtl. Protection*, 241 N.J. Super. 145, 165 (App. Div.), *certif. denied*, 122 N.J. 374 (1990); *New Jersey Bell Tel. Co. v. State, Dep't of Public Utils.*, 162 N.J. Super. 60, 77 (App. Div. 1978). We accord agency action a presumption of reasonableness if the agency "has been delegated discretion to determine the specialized and technical procedures for its tasks." *Newark v. Natural Resource Council, Dep't of Envtl. Protection*, 82 N.J. 530, 540, *cert. denied*, 449 U.S. 983, 101 S. Ct. 400, 66 L.Ed.2d 245 (1980). As such, we will not substitute our judgment as to the wisdom of an administrative action as long as the action is statutorily authorized and is not unreasonable. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562-63 (1978).

In addition, the proposition is well settled that administrative action cannot subvert or enlarge the principles and policies of the agency's enabling statute. *Abelson's, Inc. v. New Jersey State Bd. of Optometrists*, 5 N.J. 412, 424 (1950). Agency action is not precluded, however, if it can be said to promote or advance policies and findings that served as the driving force for the legislation. *A.A. Mastrangelo, Inc. v. Commissioner of Dep't of Envtl. Protection*, 90 N.J. 666, 683-84 (1982). Our Supreme Court has repeatedly stated that "an *ultra vires* finding is disfavored." *New Jersey Guild of Hearing Aid Dispensers, supra*, 75 N.J. at 561. Therefore, a grant of authority to an administrative agency "is to be liberally construed to enable the agency to accomplish its statutory responsibilities." *Id.* at 562.

Based upon these standards, we will separately evaluate petitioner's contentions that each of the DEP's separate decisions was arbitrary, capricious and unreasonable.

V

Petitioner's proposed project was located in a coastal zone. As a new housing development of twenty-five or more dwelling units, petitioner was required to obtain a CAFRA permit prior to construction. *See* N.J.S.A. 13:19-3 and -5. CAFRA was enacted in 1973 for the primary purpose of protecting the unique and fragile coastal zones of this State. *In re Egg Harbor Assoc. (Bayshore Centre)*, 94 N.J. 358, 364 (1983). To achieve this goal, the Legislature determined that "all of the coastal area should be dedicated to those kinds of land uses which promote the public health, safety and welfare, protect

public and private property, and are reasonably consistent and compatible with the natural laws governing the physical, chemical and biological environment of the coastal area." N.J.S.A. 13:19-2.

The DEP is guided by eight basic coastal policies in fulfilling its administrative role:

> i. Protect and enhance the coastal ecosystem.
>
> ii. Concentrate rather than disperse the pattern of coastal residential, commercial, industrial, and resort development, encourage the preservation of open space, and ensure the availability of suitable waterfront areas for water dependent activities.
>
> iii. Employ a method for decision making which allows each coastal location to be evaluated in terms of both the advantages and the disadvantages it offers for development.
>
> iv. Protect the health, safety and welfare of people who reside, work and visit the coastal zone.
>
> v. Promote public access to the waterfront. . . .
>
> vi. Maintain active port and industrial facilities. . . .
>
> vii. Maintain and upgrade existing energy facilities. . . .
>
> viii. Encourage residential, commercial, and recreational mixed-use redevelopment of the developed waterfront.
>
> [N.J.A.C. 7:7E-1.5(b).]

In this case, pursuant to N.J.A.C. 7:7-4, DEP received and reviewed petitioner's permit application and identified certain deficiencies in January 1994. After petitioner responded, his application was deemed complete for public hearing pursuant to N.J.A.C. 7:7-4.4(a)(2). After a public hearing, DEP was entitled to either "declare the application complete for final review or notify the applicant that additional information is required." *See* N.J.A.C. 7:7-4.6(a). Here, DEP notified petitioner that his plan was deficient with respect to five specific areas and additional information was requested as to: (1) steep slopes; (2) secondary impacts; (3) stormwater runoff; (4) vegetation; and (5) buffer zones.

Although petitioner did respond to DEP's request for additional information on buffer zones, which gained approval as of September 1994, petitioner steadfastly refused to supply additional information as to the first four areas of DEP's concern. When petitioner did not relent from his refusal to supply additional information, DEP cancelled petitioner's application, pursuant to N.J.A.C. 7:7-4.6(d).

Petitioner contends that he submitted sufficient information from which DEP could have made an informed environmental decision. he specifically argues that the agency exceeded its authority by adopting an overly broad interpretation of the rules that govern its review of such applications and, therefore, improperly demanded that petitioner furnish it with information and plans that far exceeded the explicit requirements set forth in those regulations. DEP argues that it reasonably requested information in order to determine whether petitioner's proposed major subdivision complied with the applicable

CAFRA statutes and regulations. The agency further claims that these requests for information were not excessive and unduly burdensome, and that petitioner's failure to provide the requested information provided adequate justification to cancel his application.

We agree with the DEP. As stated earlier, the Legislature has determined that "all of the coastal area should be dedicated to those kinds of land uses which promote the public health, safety and welfare, protect public and private property, and are reasonably consistent and compatible with the natural laws governing the physical, chemical and biological environment of the coastal area." N.J.S.A. 13:19-2. To achieve that goal, the DEP must be provided with sufficient data to conduct a meaningful review of an application before concluding that the application is complete for final review. N.J.A.C. 7:7-4.6(a)(1). Petitioner's refusal to comply with DEP's requests left the agency with little choice but to cancel petitioner's application. DEP's action was presumptively reasonable and will not be disturbed on appeal. *See Newark v. Natural Resource Council, Dep't of Envtl. Protection, supra,* 82 N.J. at 540.

In cancelling the application, DEP concluded that petitioner could resubmit his application pursuant to N.J.A.C. 7:7-4.6(d)(2), but that any new application would be reviewed under the CAFRA regulations adopted in July 1994. That position is consistent with the precept enunciated by the Supreme Court in *Tremarco Corp. v. Garzio,* 32 N.J. 448 (1960),

> the mere right under existing laws and ordinances to make particular use of property at the time of an application for a permit does not

immunize the owner from valis subsequently adopted legislation, state or municipal.

[*Id.* at 457 (quoting *Roselle v. Moonachie*, 49 N.J. Super. 35, 40 (App. Div. 1958))]. *See also Ocean Acres, Inc. v. State, Dep't of Envtl. Protection*, 168 N.J. Super. 597, 601 (App. Div.), *certif. denied*, 81 N.J. 352 (1979).

Petitioner challenges that decision. Petitioner argues that since his application was declared complete for the public hearing effective February 16, 1994, that application should always be subject to the pre-July 1994 coastal zone management regulations. He cites to the language proposed during the adoption process of N.J.A.C. 7:7-4.4(e), which stated in pertinent part:

> Once an application is declared complete for final review *or* for the public hearing, the rules in effect at that time will govern the staff review of the permit application. . . .
>
> [26 N.J.R. 936.]

Petitioner points out that, on adoption, N.J.A.C. 7:7-4.4(e) was changed to read:

> Once an application is declared complete for final review or for the public hearing, *whichever occurs later, the Rules on Coastal Zone Management, N.J.A.C. 7:7E et seq.*, in effect at that time will govern the staff review of the permit application. . . . [8] (emphasis added)

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[8] The underscored words represent the changes made by the agency on adoption.

Petitioner declares that under these changes, which were made without further public comment, any new application would be subject to the post-July 1994 regulations because that application has not yet been declared complete for final review. Petitioner accordingly contends that DEP violated the requirements for administrative rulemaking – specifically, N.J.A.C. 1:30-4.3 – when it made these substantial changes to N.J.A.C. 7:7-4.4(e).

N.J.S.A. 52:14B-4(a)(3) requires an agency to allow "all interested persons reasonable opportunity to submit data, views, or arguments" prior to the adoption of any rule. Variance between a rule as proposed and as adopted is regulated by N.J.A.C. 1:30-4.3, which states:

> (a) Where, following the notive of a proposed rule, an agency determines to make changes in the proposed rule which are so substantial that the changes effectively destroy the value of the original notice, the agency shall give a new notice of proposed rule and public opportunity to be heard.
>
> (b) In determining whether the changes in the proposed rule are so substantial, consideration shall be given to the extent that the changes:
>
> 1. Enlarge or curtail who and what will be affected by the proposed rule;
>
> 2. Change what is being prescribed, proscribed or otherwise mandated by the rule;
>
> 3. Enlarge or curtail the scope of the proposed rule and its burden on those affected by it.

(c) Where the changes between the rule as proposed and as adopted are not substantial, the changes shall not prevent the adopted rule from being accepted for filing. Changes which are not substantial include:

1. Spelling, punctuation, technical, and grammatical corrections;

2. Language or other changes, whose purpose and effect is to clarify the proposal or correct printing errors; and

3. Minor substantive changes which do not significantly enlarge or curtail the scope of the rule and its burden, enlarge or curtail who or what will be affected by the rule, or change what is being prescribed, proscribed or mandated by the rule.

When N.J.A.C. 7:7-4.4(E) was adopted on July 18, 1994, DEP took the position that the proposed change was a minor substantive change designed to clarify an ambiguity. *See* 26 N.J.R. 2974. It reasserts that position in response to petitioner's argument. we agree.

The original proposed language upon which petitioner relies was clearly ambiguous.[9] We note that on October 16, 1995, N.J.A.C. 7:7-4.4 was amended for CAFRA permit applications to read: "Once an application

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[9] To illustrate that ambiguity, DEP suggests the following example: An application declared complete for the public hearing in March 1994 would be reviewed under the pre-July 1994 rules. However, if the same application was then declared complete for final review in August 1994, it would be reviewed under the post-July 1994 rules. DEP points out that the same application would be subject to both the pre-and post-July 1994 rules. The adopted language eliminates that possibility.

is declared complete for final review in accordance with N.J.A.C. 7:7-4.6, the Rules on Coastal Zone Management, N.J.A.C. 7:7E, in effect at that time will govern the staff review of the permit application." N.J.A.C. 7:7-4.4(a)(4). This language further displays DEP [sic] intent that the later date, i.e., the date on which a CAFRA application is declared complete for final review as opposed to the date on which it is deemed complete for the public hearing, governs which enactment of section 7:7E will be applied by the agency during its review.

Petitioner's argument would permit him to withhold a new application indefinitely while guaranteeing the applicability of Coastal Zone Management rules deemed outmoded as of July, 1994. That position is untenable.

VI

Petitioner contends that DEP's disapproval of his proposed amendment to the Ocean County WQM Plan was arbitrary, capricious and unreasonable. Petitioner sought this amendment because the location of his proposed subdivision was outside the approved sewer service area in the Ocean County WQM Plan, and because petitioner wanted to provide sewer service to that development.

Section 208 of the Federal Clean Water Act, 33 U.S.C.A. §§ 1251-1288, requires each state to provide for areawide waste treatment management plans. In New Jersey, this is done under the Water Quality Planning act, N.J.S.A. 58:11A-1 to -16. Designated water treatment management planning areas, usually counties, must submit water quality management (WQM) plans to DEP for

adoption. N.J.S.A. 58:11A-4, -5 and -10. These plans and their amendments are sometimes referred to as "208 Plans."

N.J.S.A. 58:11A-10 and N.J.A.C. 7:15-3.1(a) prevent DEP from granting any permit if it finds that the project or activity is inconsistent with an adopted WQM Plan or the regulations in N.J.A.C. 7:15. In general, a WQM Plan identifies, among other things, treatment works necessary to meet the anticipated waste treatment needs of the area over a twenty-year period and regulates the location, modification and construction of all facilities that may result in any discharges. N.J.S.A. 58:11a-5. WQM Plans are updated annually. N.J.S.A. 58:11A-5(a).

Amendments to WQM Plans may be obtained by following the procedures outlined in N.J.A.C. 7:15-3.4. *See New Jersey Builders Ass'n v. Fenske*, 249 N.J. Super. 60, 72-73 (App. Div. 1991) (holding that the wastewater-management plan techniques set forth in N.J.A.C. 7:15-15.1 *et seq.* can also be used for amending areawide WQM Plans). In this case, petitioner was required to follow N.J.A.C. 7:15-3.4(g), since Ocean County (the designated planning agency pursuant to N.J.S.A. 58:11A-4) had not adopted its own procedures for amending a WQM Plan. A WQM Plan amendment is not valid until it is adopted by the Governor or his or her designee, i.e., DEP). N.J.A.C. 7:15-3.4(g)(9) and (10).

Under N.J.A.C. 7:15-3.4(g)(1), any interested party may petition DEP to amend an areawide WQM Plan. Within ninety days of receiving such requests, DEP must review the request and either: (1) disapprove the amendment request and return it to the applicant; (2) return the

amendment request to the applicant for additional information or other necessary changes; or (3) decide to proceed further with the amendment request. N.J.A.C. 7:15-3.4(g)(2)(i)-(iii). If the applicant then submits a revised amendment request, DEP must review such request within ninety days of receiving it and either: – (1) disapprove the amendment request, and return it to the applicant; or (2) decide to proceed further. N.J.A.C. 7:15-3.4(g)(2)(ii).

DEP claims that petitioner's arguments need not be considered, as he has failed to exhaust his administrative remedies under N.J.A.C. 7:15-3.9(a), entitled Appeals of Department decisions. That regulation states:

> (a) Within 20 calendar days from the receipt by the applicant of a written notification from the Department of the decision of the Department made pursuant to N.J.A.C. 7:15-3.4(g) 2i or ii . . . , the applicant may request an adjudicatory hearing to contest the Department decision by submitting a written request to the Department. . . . The request shall include the following information:
>
> . . . .
>
> 2. The applicant's factual position on each question alleged to be at issue, its relevance to the Department's decision, specific reference to contested factors as well as suggested revised or alternative provisions; [and]
>
> 3. Information supporting the applicant's factual position and copies of other written documents relied upon to support the request for a hearing;
>
> . . . .

(b) A hearing request not received within 20 days after receipt by the applicant of a written notification from the Department of the decision of the Department, shall be denied.

. . . .

(e) If it grants the request for a hearing, the Department shall file the request for a hearing with the Office of Administrative Law. . . .

(f) Appeals of decisions made by designated planning agencies under this subchapter shall be made to a court of competent jurisdiction.

By following N.J.A.C. 7:15-3.9(a), petitioner accordingly could have asked for a hearing after DEP disapproved his WQM Plan amendment. Exhaustion of administrative relief is required where the agency's expertise is pertinent to the dispute and the challenge requires the making of a record. *Abbott v. Burke*, 100 N.J. 269, 299-301 (1985); *Essex Counc. No. 1, N.J. Civil Serv. Ass'n, Inc. v. Gibson*, 118 N.J. Super. 583, 586 (App. Div. 1972). Moreover, as a general rule, we do not entertain actions at law if there is available a right of review before an administrative agency which has not been exhausted. *See Riggs v. Township of Long Beach*, 101 N.J. 515, 525 (1986). Such exhaustion, however, is not required if a question only of law is involved or if administrative remedy would be futile. *Abbott, supra*, 100 N.J. at 297-99. We conclude that petitioner's application for an amendment to the Ocean County WQM Plan neither involves solely a question of law nor suggests evidence that administrative review would be futile.

Having failed to exhaust his administrative remedy, petitioner is precluded from challenging DEP's decision in this appeal. In reaching this conclusion, we are aware that there is no regulation that will preclude petitioner from submitting a new amendment proposal in conjunction with any future CAFRA application.

Petitioner contends that DEP improperly rejected his proposed on-site mitigation plan and that the agency unduly delayed in reviewing his mitigation plan.

The Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, requires mitigation as a condition in a freshwater wetlands permit. N.J.S.A. 13:9B-13(a). The purpose of mitigation is to compensate for the loss of wetlands that is authorized by a freshwater wetlands permit. Specifically, N.J.S.A. 13:9B-13(b) states in part:

> The department may require the creation, enhancement, or restoration of an area of freshwater wetlands of equal ecological value to those which will be lost, and shall determine whether the creation, enhancement, or restoration of freshwater wetlands is conducted onsite or offsite. The department shall accept and evaluate a proposal to create, enhance, or restore an area of freshwater wetlands only after the department has evaluated the permit application for which the proposal is made, and shall evaluate the proposal to create, enhance, or restore an area of freshwater wetlands independently of the permit application.

Thus, N.J.S.A. 13:9B-13(b) makes clear that DEP has the sole authority to determine whether mitigation is conducted on-site or off-site. In fact, if DEP finds that on-site mitigation is not feasible, it may then consider the

options of off-site mitigation or of a contribution to the Wetlands Mitigation Bank. N.J.S.A. 13:9B-13(c).

N.J.S.A. 13:9B-13(b) also makes clear that DEP does not have to consider a mitigation proposal in determining whether to award a freshwater wetlands permit to a proposed project. Instead, DEP is required to consider mitigation only after it has evaluated the permit application. In fact, N.J.A.C. 7:7a-14.1(d) states:

> The Department shall not consider a mitigation proposal in determining whether a project should be awarded a permit but shall require mitigation as a condition of any permit found to be acceptable under the criteria listed in N.J.A.C. 7:7a-3.

Although petitioner submitted his proposed mitigation plan in 1988, DEP did not have to evaluate that plan until after it awarded him the freshwater wetlands permit on June 25, 1992. DEP's evaluation of petitioner's proposed mitigation plan during its pre-application review of his CAFRA permit application in early 1993 was not unreasonably delayed.

On August 9 and November 22, 1993, DEP provided petitioner with "initial assessments" and "informal" guidance with respect to his mitigation plan. On August 9, 1994 DEP's principal environmental specialist in the Bureau of Coastal Regulation deemed petitioner's on-site mitigation plan as "unacceptable" for the following reasons:

> 1. The proposed mitigation area is in a forested upland condition. The Freshwater Wetland Act Rules (N.J.A.C. 7:7A-14.2(a) 2i) discourages the

creation of wetlands from exiting climax habitats.

2. The proposed mitigation site has not provided an appropriate transition area as required by the Rules (N.J.A.C. 7:7A-14.2(a)2iii).

3. The proposed mitigation site is not suitable for the establishment of Atlantic White Cedar.

Based upon the above the Program has determined that on-site mitigation is impracticable. The permittee is directed to search for a site within the same watershed as the proposed disturbance. The following information is needed so that the Program can determine if mitigation in the same watershed is feasible.

The letter than delineated additional material petitioner was to submit to allow a determination of feasibility.

Although that letter was arguably a final determination, the request for additional information would also permit the conclusion that DEP had not conclusively determined the feasibility issue and had not conclusively rejected petitioner's mitigation plan.

N.J.A.C. 7:7A-12.7 gives the petitioner the right to request an administrative hearing to contest the agency's determination on mitigation issues. Petitioner clearly has not exhausted that available remedy. His appeal of the mitigation issue will be dismissed.

CONCLUSION

We affirm the decision canceling petitioner's CAFRA permit application. We dismiss petitioner's appeal from the disapproval of the WQM Plan amendment request and the disapproval of petitioner's mitigation plan.

DARWIN R. GRIFFIN, Plaintiff, V. STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION (NJDEP), Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY DOCKET NO. OCN-L-2456-95 Civil Action OPINION

Decided February 11, 1998

Seymour J. Kagan, Esq. for plaintiff (Berry, Kagan, Sahradnik & Kotzas)

Rachel Horowitz, Deputy Attorney General for defendant (Peter Verniero, Attorney General of New Jersey, attorney)

FORD, J.S.C.

This matter involves a claim for just compensation based upon an alleged regulatory taking of real property. Plaintiff, Darwin Griffith, is the owner of a certain tract of real property located in Little Egg Harbor Township. Defendant is the New Jersey Department of Environmental Protection and Energy, the agency with regulatory responsibility for the Coastal Area Facilities Review Act ("CAFRA"), the Freshwater Wetlands Protection Act ("FWPA") and other environmental laws, rules and regulations.

The liability and the damages portion of this inverse condemnation trial were bifurcated, and trial was on

liability only. The Court heard testimony over the course of thirteen noncontiguous days. The parties submitted to the Court written summations, proposed findings of facts and conclusions of law, together with legal briefs, the last of which was received by the Court on November 5, 1997.

The following constitutes the decision of the Court, including factual and legal findings, after consideration of the evidence, the argument of counsel and the post trial written submissions.

I. Statement of Facts

During 1966, Plaintiff Darwin Griffith participated in a joint business venture, known during the course of the trial as "JV-I". Together with *his* fellow joint venturers, Plaintiff acquired an interest in certain tracts of real property located in Little Egg Harbor Township, Ocean County, and totaling approximately 820 acres. This property is collectively referred to as "Tall Cedars". The purpose of JV-I was to acquire property for long term investment and then to sell it for financial gain. The acquisition of this property preceded the enactment of certain environmental regulations, including but not limited to, the Coastal Area Facilities Review Act (N.J.S.A. 13:19-1 *et seq.*), the Pinelands Protection Act (N.J.S.A. 13:18A-1 *et seq.*), and the Freshwater Wetlands Protection Acts (N.J.S.A. 13:9B-1 *et seq.*).

Griffith testified that in 1968 a new joint venture agreement ("JV-II") was executed between the parties which included additional lands, referred to herein as "Holly Lake". The purpose of JV-II was also land purchases, sales or lease for long term economic gain. By

1983, Griffith held a thirty-five percent interest in the jointly held lands, his partner and joint venturer, Joseph Courter, Sr., held the remaining sixty-five percent interest. The jointly owned lands encompassed approximately 1,000 acres in Little Egg Harbor Township, and consisted of the "Tall Cedars" and "Holly Lake" tracts. For the purposes of this condemnation proceeding, the State alleges these joint ventures constituted a unitary investment scheme.

Griffith filed a partition action against Courter in 1983, which was resolved in 1984. A March 1984 order memorialized the settlement between Griffith and Courter and awarded Griffith certain lands including Block 78, Lot 33 on the current Little Egg Harbor Township Tax Map, the property in question, and five other parcels, constituting a total of 116 acres. In addition, by Court order dated June 5, 1984, Griffith obtained an access easement across the Courter property from a paper street called Bridge Road over property owned by Mr. Courter, known as Block 78, Lot 21A, to Block 78, Lot 33, the property in question.[1] Plaintiff testified the property across which the easement traversed was encumbered by substantial title problems, and the cost of obtaining clear title to the property was cost prohibitive if not impossible. The Court accepts this testimony as factual.

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[1] The property in question was formerly designated as part of Block 78, Lot 6 on the Little Egg Harbor Township Tax Map, and was part of several parcels awarded to Plaintiff in the partition action. It is now known as Block 78, Lot 33 on the current Little Egg Harbor Township Tax Map (hereinafter referred to as the "subject property"). It consists of approximately 60 acres.

In order to obtain access to the property in question, the only alternative means of access as by way of Nugentown Road, a paved public roadway fronting Plaintiff's property. This method of access would require a fill permit from the United States Army Corps of Engineers under Sec. 404 of the Clean Water Act, 33 U.S.C. Sec. 1344, since the road frontage consists almost entirely of freshwater wetlands. Although Griffith obtained sole ownership of other lands not subject to environmental constraints, these properties were not located immediately adjacent to the subject property, but were located along North Green Street in a business zone about one mile away from the subject property.[2]

Griffith's purpose in pursuing legal access to the property was based on marketing considerations. Access from Nugentown Road would facilitate the marketing and sale of the property. Griffith was aware that in 1982 a title insurance company had declined to provide coverage for the lands encompassed within the Bridge Road access easement. A landlocked parcel would be virtually valueless; thus Griffith's only hope was to obtain access off Nugentown Road.

Plaintiff therefore applied, in 1987, to the Army Corps of Engineers for a permit to fill onsite wetlands in order to build an access road to the subject property from Nugentown Road. Approximately 40 acres of the property in question consists of uplands, and the remaining 23 acres are wetlands. The proposed access road would

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[2] In September, 1986, Griffith sold one part of the property received in the partition, a 26 acre tract, for $425,000 and in December 1986, he sold the Holly Lake tract for $576,000.

necessitate filling approximately 0.50 acres of wetlands in order to gain suitable entry to the 40 acres of buildable uplands. Griffith proposed an access road with a maximum width of 26 feet.

While Griffith's application for a permit from the Army Corps of Engineers was pending, the Legislature enacted the FWPA, N.J.S.A. 13:9 B-1 *et seq.*, which established a new regulatory scheme over development in and around freshwater wetlands. Griffith was thus compelled to bring his application before the NJDEP for a FWPA Permit in order to fill the 0.5 acre of wetlands and to construct the access road.

A. THE FRESHWATER WETLANDS PROTECTION ACT PERMIT

In August, 1988, Griffith applied for a FWPA permit, again seeking permission to construct a 26 foot wide road from Nugentown Road, crossing and filling 0.5 acres of freshwater wetlands, to the upland portion of Block 78, Lot 33.

The permit application was considered complete as of October 17, 1988, and became subject to a review period of 180 days which was extended to May 17, 1989. The application was reviewed by NJDEP staff member William Dixon under the supervision of Richard Brown.

The permit application stated the "project purpose" as to provide the owner access to the uplands area of the property. It did not include any plan for residential development, however, the plan included a note that stated: " . . . economically feasible residential development of

approximately 40 acres of upland required the construction of at least a 26 foot wide road to provide adequate ingress and egress."

In March 1988, while the ACOE permit application was pending, the NJDEP, by its Director of Coastal Resources, John Weingart, sent a letter to the Army Corps of Engineers advising the Corps the proposed 26 foot wide access road from Nugentown Road through freshwater wetlands was the only feasible alternative means of access and would be consistent with NJDEP's Coastal Zone Management Plan, provided an acceptable wetlands mitigation plan was approved. However, the NJDEP altered its position and subsequently maintained that Plaintiff had viable alternative access by the easement off of Bridge Road. This was prompted by correspondence received by NJDEP from Richard Shackleton, Esq., an attorney for certain objectors to Griffith's application for a FWPA permit.

In July 1989, the NJDEP denied Plaintiff's FWPA permit and Water Quality Management ("WQM") certification applications. The NJDEP claimed the applications were denied because access to the property could be obtained over Lot 21A, the adjoining lot owned by Mr. Courter. Such access was deemed environmentally preferable to the proposed Nugentown access. The NJDEP further found Plaintiff had failed to demonstrate a compelling public need for the project or that a permit denial would result in an extraordinary hardship.

The NJDEP stated the onsite wetlands were of "exceptional resource value" based on the presence of an endangered species, Pine Barrens tree frogs, located both

upstream and downstream of the site. Although the site had previously been designated "intermediate resource value", it was upgraded to "exceptional resource value" based upon anecdotal evidence submitted during the review process by Richard Brown, a former employee of the Pinelands Commission and employee at the time of the NJDEP.

Both parties concede the Pine Barrens tree frog is an endangered species, but Griffith denies there is any credible evidence of endangered species sightings on the subject property. NJDEP representative Brown testified he attended a meeting of the Planning Board of Little Egg Harbor Township when it was considering Griffith's application for preliminary site plan approval for the access road. His purpose in attending the meeting was to provide information and to give the NJDEP's position on the proposed development plan. The Planning Board denied Griffith's application for preliminary site plan approval for the proposed access road in March 1989. Brown testified he visited the Griffith site in December 1988, and observed a stand of Atlantic White Cedar trees at or near the site of the proposed access road. He further observed wetlands curving around the back of the property and across Bridge Road and a small pond across Bridge Road off site. He also observed vacant land abutting the subject property that could potentially provide access (Block 78, Lot 21A, owned by the Pinelands Regional School District).[3]

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[3] NJDEP and Griffith approached the Pinelands Regional School Board at their meeting on March 22, 1989, to urge the Board to sell some of its adjacent land to Griffith so there could

Brown further testified that on May 18, 1989, he surveyed the subject property for the presence of tree frogs. He stopped at the bridge on Nugentown Road and "called" for tree frogs but did not get a response. He then went down Bridge Road to the wetlands that pass through the Griffith site and heard tree frogs "calling all over the place" from the pond upstream of Bridge Road.[4] Brown's testimony further indicated that the mating season usually occurred during May, June and July, and that was when one could hear the tree frogs calling. Brown prepared a map showing the purported tree frog locations and he completed an "endangered species sighting form". He also advised Dixon and Torak of his findings. The freshwater wetlands on the Griffith site were thus reclassified as "exceptional resource value" based upon this information provided by Brown. Mr. Griffith did not receive any notification or have an opportunity to rebut any information submitted as to the reclassification of the property to a resource of exceptional value.

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be access to the property over uplands across Block 78, Lot 26 adjacent to the subject property. Plaintiff claims he advised the NJDEP representative that the easement obtained in the partition action to Block 78, Lot 33 from Bridge Road had a title problem and further maintains that this was disclosed to the Army Corp of Engineers in September 1987. The NJDEP representative testified that he had no recollection of the conversation.

[4] Brown, although not accepted by the Court as an expert in the area of tree frogs or offered as same by the State, testified that he was known at the Pinelands Commission, as well as within the NJDEP, as someone who was able to " . . . call tree frogs and have them respond . . . ".

Griffith appealed the Agency decision denying the FWPA permit and WQM certification and requested an administrative hearing. He submitted additional materials to the NJDEP, including information on the title problems which he said effectively precluded use of the Bridge Road easement. The matter was referred to the Office of Administrative Law ("OAL") as a contested case in December 1989.

William Dixon, NJDEP staff member, testified his first knowledge of the apparent alternative access through Lot 21A was provided by Richard Shackleton, Esq., an attorney representing opponents to Griffith's application before the Little Egg Harbor Township Planning Board. Mr. Dixon testified he traveled to Mr. Shackleton's office for a conference, and later secured documentation from the Ocean County Clerk's Office that caused him to conclude there was a viable alternative access to the property by the Bridge Road easement. NJDEP representatives never inquired of Mr. Griffith why Lot 21A access was not being proposed. The Agency further failed to advise Griffith or any of his legal representatives that such an access location was preferable to the one proposed. Another NJDEP witness, Mr. Richard Brown, admitted the Agency should have discussed this issue with Mr. Griffith's attorney prior to the July 1989, denial of the permit application.

The Griffith matter traveled through the administrative appeals process. A settlement conference was held during March 1990, and the parties agreed to send concurrent letters to adjacent land owners to inquire as to the availability of alternative access through other uplands rather then through the wetlands off of Nugentown Road.

The parties also agreed if alternative access could not be accomplished through the Bridge Road easement, or adjacent lands, the FWPA permit would issue.

None of the inquiries to surrounding property owners produced any reasonable or realistic avenues for alternative access.

In May 1990, NJDEP conceded access to the property by way of the Bridge Road easement could not be achieved. However, NJDEP now advised Griffith, pursuant to N.J.A.C. 7:7A-3.2, to institute a quiet title action in order to rebut the presumption of "practical alternative access". On June 18, 1990, the parties submitted their dispute to Administrative Law Judge Duncan on a factual stipulation, the only legal issue being whether Griffith had a legal obligation to file a quiet title action before receiving a permit. The ALJ ruled in favor of NJDEP and found Griffith was required to pursue a quiet title action in an effort to clear the title defects in the Bridge Road easement. Griffith then appealed to the NJDEP Commissioner. On November 5, 1990, NJDEP Commissioner, Judith Yaskin, reversed the ALJ's initial decision. Commissioner Yaskin held the FWPA did not require an applicant to pursue a remote or hypothetical alternative in order to exhaust all practical alternatives to the filling of freshwater wetlands. The Commissioner remanded the case to determine the likelihood of success of a quiet title action. If the ALJ held there was no practical alternative to the Nugentown Road access, Commissioner Yaskin

held, " . . . she need not address DCR's[5] classification of the wetlands as exceptional resource value."

Thus, it was not until Mach 15, 1991, that the NJDEP accepted Griffith's claim that access from Nugentown Road was the only practical alternative. In April 1991, NJDEP forwarded a proposed stipulation of settlement to Griffith which provided, among other things, that a FWPA Permit be issued for a *16 foot wide road*. The proposed permit provided it could be modified to accommodate a wider road if required by local subdivision or municipal requirements. Since this condition would be attached to the permit, an applicant would be required to obtain a major modification of the permit, in effect, to pursue a new application. Furthermore, since most residential subdivision ordinances required roadways of at least 26 feet, this condition precluded designing a roadway network that would meet municipal approvals. Griffith would not agree to that stipulation, triggering yet another dispute between Griffith and NJDEP. The matter was ultimately referred by the ALJ to the NJDEP Commissioner, Scott Weiner, who issued a final decision in December, 1991. The Commissioner determined the OAL lacked jurisdiction to require subdivision approval as a permit condition, and the matter was, again, sent back to the OAL for further findings. On February 2, 1994, ALJ Parker granted NJDEP's motion for summary decision and recommended the Commissioner affirm the remaining contested permit conditions, that the permit be limited to construction of a 16 foot wide road, and that any enhancement of the road width be considered a permit

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[5] Division of Coastal Resources

modification. This decision was again appealed by the applicant to the NJDEP Commissioner, this time, to Commissioner Robert Shinn, who issued his final decision on May 25, 1994. The Commissioner ordered the permit to be modified so Griffith could immediately apply for a wider road, and he directed NJDEP to change the permits effective date to be effective " . . . upon satisfaction of all conditions precedent", and its expiration date to be June 25, 1997. In July 1994, Griffith appealed the Commissioner's decision to the Appellate Division of the Superior Court. In January 1995, he appealed the Agency's decision to "cancel" his CAFRA application; the denial of his application for an amendment to the Ocean County Water Quality Management Plan ("208 Plan"), and the rejection of his wetlands mitigation proposal. The Appellate Division rendered its decision in May 1996. Based upon the Appellate Division decision, NJDEP issued permit modification letters, in August and October 1996, modifying the permit. It became effective August 14, 1996, and the permit eliminated the need to apply for a modification for a wider road in the event of receipt of major subdivision approval.

In July, 1995, Griffith also filed this complaint alleging a regulatory taking or inverse condemnation, as well as other constitutional claims.

The Appellate Division affirmed the cancellation of the CAFRA permit and dismissed the claims respecting the extension of the sewer service area (the 208 Plan amendment) and the mitigation plan because administrative remedies had not been exhausted. The Appellate Division also reversed the condition attached to Griffith's

FWPA Permit requiring him to apply for a permit modification if a road wider than 16 feet was constructed. The Appellate Division did not address any constitutional issues related to whether the permit effected a regulatory taking.

The effect of this convoluted legal and regulatory process was a permit issued under the authority of the FWPA. However, Griffith's application, first applied for in August 1988, was granted and effective August 14, 1996, 8 years later.

The FWPA permit was conditioned upon approval of a wetlands mitigation plan. Mitigation requires the "creation" of wetlands at a 2:1 ratio for those wetlands destroyed by the proposed development. Griffith also needed a permit issued under CAFRA. In order to provide sanitary sewer service for waste water generated by the proposed residential development, Griffith needed to include his property within a sewer extension region, and since it was not, he needed to obtain an amendment to the 208 Plan. If the proposed residential development could not be serviced by sewers, the lots would have to be serviced by individual septic systems which, under Pinelands regulations, would have required one acre lots rather than the half acre provided by zoning. Again, Griffith testified he needed these approvals in order to make the site more marketable. In other words, land "with approvals" would be inherently more marketable and valuable than land without approvals.

Both Mr. Dixon and Mr. Brown testified they were prepared to approve Mr. Griffiths FWPA and WQM Certification applications before the issue of an alternative

access through Lot 21A was raised. Mr. Dixon further testified that NJDEP's July 1989, denial of the FWPA permit was partly motivated by a concern that neighboring objectors would sue the Agency if Mr. Griffith's FWPA and WQM Certification applications were granted. Mr. Dixon testified the Agency also considered the public opposition to the application, from the Planning Board, from Little Egg Harbor Township and from the Borough of Tuckerton, the latter of which attempted unsuccessfully to join in the permit application process as an interested party. Mr. Brown testified he felt "snookered" because the information about the access across Lot 21A had not been provided voluntarily by Mr. Griffith. He concluded the applicant concealed important information about his application to the Agency. Plaintiff alleges the Agency thereafter embarked upon a course and pattern of conduct to frustrate his efforts to obtain agency approvals all motivated by staff's personal animosity toward the applicant. Furthermore, Plaintiff alleges the Agency delayed processing his applications and failed to provide proper guidance in an effort to deny Mr. Griffith any economically viable use of his property. Plaintiff alleges institutional bias against this particular applicant; the effect of which constitutes a regulatory taking of his property.

The applicant's frustration is best illustrated by the experience with the appropriate resource value classification for the onsite wetland. The wetlands were initially assigned an intermediate resource value but were reclassified to exceptional value based upon Mr. Brown's field inspection and his conclusion that the property was either habitat or suitable habitat for Pine Barrens tree

frogs, an endangered species. The NJDEP maintained this position from July 19, 1989, permit denial until February 7, 1992, when Larry Torak, the Agency's scientist responsible for classifying wetlands, reversed the NJDEP's position a second time. The intermediate resource value was then restored to the wetlands surrounding the access road area. All of this impacted upon the ability of the applicant to design an acceptable access road and residential development, since the resource value classification dictates the size of the buffer or transition areas around wetlands. Wetlands of intermediate value require 50 foot buffer or transition areas, whereas more environmentally sensitive wetlands, i.e., "exceptional value", require 150 foot buffers.

The NJDEP also disputed the location of the access road. The permit issued on June 25, 1992, required the access road to be located along the property boundary adjacent to Lots 28 and 29. Such a location would not satisfy site triangle requirements of the Little Egg Harbor Township Major Subdivision Ordinance. It was not until January 12, 1994, that NJDEP agreed the location of the road would have to be as depicted in the original plan submitted by the applicant, and in accordance with the local land use ordinance.

The June 25, 1992, FWPA permit required Plaintiff as a condition of approval to procure preliminary subdivision approval. But on May 25, 1994, the NJDEP conceded it could not require preliminary subdivision approval as a prerequisite to the issuance of a FWPA Permit and WQM Certification. The August 14, 1996, modification to the June 1992, permit inserted a CAFRA approval precondition, which was later deleted, again, by the NJDEP.

Plaintiff alleges the NJDEP adopted and then abandoned unjustified positions which only served to unnecessarily prolong the application process and required numerous administrative appeals. The Court is satisfied the Agency's actions drastically inflated Plaintiff's already substantial expenses in obtaining approvals on the property.

NJDEP maintains it never received a residential development proposal as part of the initial application for a FWPA permit, and therefore could not know the actual development proposal. While the NJDEP did not received [sic] a proposed subdivision plan, a note on the original August, 1988, FWPA application map contained the following note: "Considered in context of the existing permitted density, as determined by all those authorities having jurisdiction, it is the opinion of Fellows, Read and Associates that any economically feasible residential development of approximately 40 acres of upland. . . . requires the construction of at least a 26 foot wide access road to provide adequate ingress and egress" (Exhibit P-93). The Court is persuaded NJDEP's position on this issue is disingenuous at best. The applicant's intent to develop the 40 acres of uplands as a residential housing development was apparent from the date of the initial application, as appears from the Exhibit marked P-93 in evidence.

B. THE WETLANDS MITIGATION PLAN

As part of the FWPA application, Griffith's consultants submitted a proposed Wetlands Mitigation Plan

dated June 1988, (Exhibit P-16). This plan proposed creating two acres of white cedar swamp in the uplands of Block 78, Lot 33. The proposal was based upon the assumption that NJDEP policies encouraged the creation of white cedar swamp in the onsite uplands as mitigation. When the 1992 FWPA permit was finally issued to Griffith, it contained Administrative Condition Number 4 providing: " . . . prior to the commencement of any construction in freshwater wetlands, the applicant shall submit a mitigation plan to this office and receive written approval. . . . the mitigation must be carried out prior to or concurrently with the road project. . . . " (Exhibit J-35 and Exhibit P-89, page 69)

A reshaped mitigation area was proposed by the applicant and depicted by an attachment to a May 1994, letter from R. Bradley Tombs, Plaintiff's environmental expert. The reshaped area showed onsite mitigation, met the ratio of 2:1 mitigation as required by N.J.A.C. 7:7A-14.2(a)2i, and provided a 50 foot buffer or wetlands transition area between the mitigation area and the access road (based upon the assumption that the wetlands were of intermediate resource value). In August 1994, the mitigation plan was officially deemed unacceptable. The Agency directed Griffith to explore offsite mitigation alternatives, all of which necessarily impacted upon his ability to design any proposed residential development plan for the subject premises. Even though, NJDEP, by Mr. Dixon's August 1994, letter, directed Plaintiff to pursue offsite mitigation within the same watershed, recognized the area was limited, and the search would in all probability be unsuccessful. The majority of the watershed was a mature forest and Dixon recognized it would

not be suitable or available as an alternate mitigation site. Plaintiff contends NJDEP's position required Griffith to undertake an [illegible] expensive search that would in all likelihood be futile. The next step would then be to direct Mr. Griffith to search out other watersheds before the Agency would consider an alternative provided by law, that is, a financial or land contribution to the Wetlands Mitigation Council in lieu of onsite mitigation. By now, court and administrative decisions had determined the FWPA Permit and WQM Certification expiration dates were extended to August 14, 2001, but Plaintiff contends these dates were meaningless since the time period for the permit would be largely consumed in satisfying the mitigation condition. Without the approval, Plaintiff is effectively without a valid permit and continues to be precluded from making any economical viable use of this property.

Thus, in addition to the delay in issuing the August 14, 1996, FWPA permit and WQM certification, Plaintiff maintains the conditions attached to same cannot be satisfied within the time provided. While these conditions may be consistent with the authority bestowed on the Agency by law, Plaintiff argues the effect deprives Plaintiff of the use of his property and any economic benefit derived thereby.

C. THE CAFRA PERMIT

In November, 1993, Plaintiff submitted an application for a permit pursuant to the CAFRA, N.J.S.A. 13:19-1 *et seq.* The plan submitted showed a proposal for development of the property as a 44 lot residential subdivision. In

December 1994, the NJDEP "canceled" this application based upon the Plaintiff's failure to submit information concerning the utilization or development of steep slope areas, the secondary impacts, storm water runoff and vegetation.

As with the FWPA application, mitigation was an issue. Dixon testified that NJDEP decided onsite mitigation would not be practical based upon its experience in implementing the FWPA, thus rejecting a plan to create a white cedar swamp in uplands. Dixon testified he believed Griffith's most viable mitigation option was to make a contribution to the Wetlands Mitigation Council. However, before making such a contribution, agency policies required Griffith to explore potential offsite mitigation in the same watershed.

Dixon was involved with a preapplication conference on the Griffith CAFRA application. He further testified Griffith was advised his proposed onsite mitigation was not suitable and that it would be difficult to obtain approval of an amendment to the 208 Plan which would be required for the sewer system. Since Block 78, Lot 33 was not located in a mapped sewer area under the 208 Plan, a petition would have to be made to make that amendment. Furthermore the site was located in a CAFRA "limited growth" region pursuant to N.J.A.C. 7:7E-5.3(I).

The CAFRA application was reviewed for administrative completeness and on December 21, 1993, additional information was requested. Once NJDEP received the requested information it forwarded copies of the application to various groups within and without NJDEP

for comment, and a project officer would be assigned. Dixon became the project officer for the Griffith CAFRA application. Among the comments included concerns from the NJDEP Division of Fish, Game and Wildlife Endangered and Nongame Species Program as to the impact upon Pine Barrens tree frogs.

Dixon also received comments from William Slack, Ocean County Soil Conservation District, who proposed a minor redesign of the pipe outlets for the proposed storm water basins, and requested a proposed grading plan for the entire site. Dixon testified that the comments received from the Ocean County Soil Conservation District were common. He further testified he never reviewed or recommended for approval a CAFRA application which proposed the level of development as set forth in the Griffith application but did not contain a grading plan. A copy of the Griffith CAFRA application was also sent to the NJDEP Land Use Regulation Program which submitted a memo on the storm water management aspects of the application (Exhibit J-50).

On January 26, 1994, Dixon sent a letter to Mr. Tombs declaring the CAFRA application deficient and requesting additional information in nine areas (Exhibit J-44). Dixon testified that the additional requested information, (including a soil erosion and sediment control plan and a landscaping plan) was a routine submission on other CAFRA applications. Griffith's representative, Mr. Tombs, responded to that deficiency letter on February 14, 1994, (Exhibit P-57), submitting revised plans. On behalf of Griffith, Mr. Tombs opined the NJDEP was requesting documentation not legally necessary to support an application for a CAFRA permit, and as a practical matter, not

necessary to deem the application complete for review and public hearing.

A public hearing was held on the proposed CAFRA application. Dixon was the hearing officer. All persons appearing spoke in opposition to the project, and some opposed the previous issuance of the 1992 FWPA permit, even though that permit was not a subject of the hearing. Written comments opposed the project, including comments from the Borough of Tuckerton objecting to both the 1992 FWPA permit and the 1993 CAFRA application. The Borough of Tuckerton was concerned about the negative impact of the project on Lake Pohatcong, also known as Tuckerton Lake. Dixon testified the public comments raised concerns that the proposed residential project would have off site water quality impacts and that all proper procedures should be followed in light of a potential third party appeal. Dixon prepared a preliminary analysis of the CAFRA application, Exhibit J-51, which was made available at the public hearing. The analysis contained a request for additional information on secondary impacts, storm water runoff, vegetation and wetlands buffers that he said were commonly requested for other CAFRA applications. Dixon testified he received Griffith's response to the preliminary analysis in July 1997 (Exhibit P-67), but he then sent additional letters (Exhibit J-57 and J-60) requesting more information. He testified he was instructed by his supervisor that if the additional information was not provided the application would be canceled.[6]

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[6] That is what ultimately happened.

Dixon reviewed Griffith's application for a 208 Plan amendment to include all of Block 78, Lot 33 in a sewer service area. The Land Use Regulation Program in NJDEP was concerned the sewer extension was proposed in a CAFRA Limited Growth Region and would cause secondary impacts, such as greater residential density on site then would occur if septic systems were used. The Program was concerned that additional development promoted by a sewer line would have potential adverse water quality impacts based on an increase in non-profit source pollution.

Dixon testified, before canceling Griffith's CAFRA application, he advised the applicant if the application was not deemed complete for review by July 18, 1994, the effective date of revised CAFRA regulations, the subject property would be subject to the new rules and regulations.

By July 18, 1994, NJDEP was still not satisfied with Griffith's submissions, even though the public hearing had already occurred, NJDEP refused to deem the application complete for review, thereby subjecting the Griffith application to the new regulations. Dixon testified the proposed development would have caused negative environmental impacts through site clearing, grading, the use of pavement, storm water runoff, and non-point source pollution. The revised plan showed typical lot clearing and vegetation, but it did not show how the site would be regraded to construct homes. NJDEP maintained it was not possible to determine how the land would be disturbed. The NJDEP representative testified NJDEP needed to assess the impact of the extent of runoff and proposed onsite flow of drainage water. The decision to

cancel the application, according to the NJDEP, was based solely on Griffith's failure to complete it by providing requested information. The question, however, is how far must an applicant be required to go, in terms of the detail of his development plan, in order to be deemed complete for review.

As a result of the rule modifications effective July 18, 1994, the definition of environmental sensitivity was revised to include "forested areas", although such a revision does not seem to result from any legislative mandate. The impact upon Plaintiff was substantial, since his property included mature forested tree areas. The enhanced environmental sensitivity rating thus necessitated a total redesign of the uplands residential development.

D. THE 208 PLAN AMENDMENT

In January, 1994, James F. Stanton, P.E., filed an application with the NJDEP for an amendment to the 208 Plan. In March, 1995, NJDEP denied this application because the proposed plan amendment would be inconsistent with the Coastal Zone Management Rules. The Agency found the proposed sewer service area extension would create a potential to disperse development into existing undeveloped areas of the limited growth region and allow for a higher density of development within this region (Exhibit J-69). NJDEP also based its refusal upon the fact that the proposal to expand the sewer service area was inconsistent with the Pinelands Comprehensive Management Plan.

Apparently a part of the subject property was located within the Pinelands National Reserve Rural Development Area/CAFRA Overlap Region, and NJDEP deferred to Pinelands regulations in such areas. However, that portion of Block 78, Lot 33, located within the Pinelands, National Preserve, Rural development Area, was *not* included in the proposed sewer service extension area. NJDEP's actions on this, therefore, are difficult to reconcile with the actual location of the property.

The applicant's engineer, Mr. Stanton, opined secondary impacts were unlikely to result from the proposed development, since any adjacent property owners seeking to tie into Plaintiff's sewer collection system would need prior approval of the NJDEP. The agency would still maintain control of the secondary impacts. The NJDEP representative, Mark Mauriello, testified secondary impacts issues could have been satisfactorily resolved by placing appropriate conditions on a WQM permit and restricting any expansion of the system to that property alone. Ruth Ehinger, the manager of NJDEP's Bureau of Coastal Regulation, and Mr. Dixon and Mr. Mauriello's superior, concurred the secondary impacts issue could be dealt with in this way.

The NJDEP and Plaintiff's engineer, Mr. Stanton, disagree as to the number of units which could be derived from the property depending upon whether a septic system is used or a sanitary sewer system. Coastal Zone Management Rules provide for one dwelling unit per acre if the septic system is a pressure dose system, or one dwelling per 3.2 acres if a standard gravity type septic system is used. This acreage is exclusive of wetlands and

wetland buffers. However, Mr. Stanton opined that Pinelands regulations (which NJDEP defers to in the overlap area) would require the pressurized system with minimum one acre lots. Using septic systems on one acre lots would restrict the subject property to a maximum development density of only 22 lots, that is, one acre lots on the approximate 44 acres of uplands, excluding areas used for roads, sidewalks, easements and other necessary common areas. Mr. Stanton testified the per lot development cost of a 22 lot residential subdivision using pressure dose septic systems and onsite potable water wells would be about $61,000 per lot. These projected development costs are in addition to the cost for land purchase, financing, marketing, closing, carrying costs, risk factors and entrepreneurial profit. Plaintiff's real estate expert, Kenneth Walker, opined the current market price for the proposed 44 lot subdivision would be between $50-$60,000 per lot. Therefore, a per lot development cost of $61,000, plus the other costs cited above, would greatly exceed any realistic marketable price for these lots. The Court accepts the opinion of Plaintiff's experts that a development as permitted by the NJDEP would greatly exceed the market value of the lots for proposed residential use. Even if the Agency's actions are reasonable and consistent with its statutory and regulatory authority, the effect of these rules and regulations is to deprive Plaintiff of the substantial economic benefit of his ownership of the property.

Apparently, based upon the evidence presented, the NJDEP would have approved an amendment to the 208 Plan to include Block 78, Lot 33 in a sewer service area, provided the residential densities did not exceed the

Pinelands standards for septic systems, see Exhibit P-92. Again, there is a conflict between Plaintiff's expert and the NJDEP as to the impact of the Pinelands standards on the subject premises. The NJDEP representatives testified the Pinelands standards did not require one acre lots. Therefore, NJDEP representatives assumed approximately 40 units with individual pressure dose septic could be put on the 40 acres of uplands within Block 78, Lot 33. By clustering the units on smaller lots, NJDEP representatives assumed a greater number of units could be accommodated, provided the overall density was one acre per unit. However, it is clear to the Court the NJDEP did not base this opinion on any recognized planning or design criteria, but upon an assumption that lot clustering would meet both the Pinelands criteria as well as the local land use law. There is no evidence before the Court to accept this position, and in fact it is not accepted by the Court.

Mark Mauriello, the current supervisor of NJDEP land use permitting within Ocean County, testified he has reviewed between 400 to 500 CAFRA applications as a project review officer and approximately 1,000 applications as a supervisor for NJDEP. He was primarily responsible for drafting the revisions to the rules on Coastal Zone Management, N.J.A.C., 7:7E, effective June 1994, and required by the 1993 amendments to CAFRA. P.L. 1993, Ch. 190. In his opinion, the site was subject to CAFRA regulation only if 25 or more residential units were proposed. Plaintiff's experts, Tombs and Stanton, opined CAFRA approval would be necessary, even if there were less than 25 residential units developed, because the internal road network would exceed 1,200

linear feet, thus triggering CAFRA review as a "public development" within the meaning of N.J.A.C. 7:7-2.1(b). The Court accepts for purposes of this dispute that a development of less than 25 residential units would not require a CAFRA permit. However, such a development would not be economically feasible since either a pressure dose septic system or a sewer system would require capital investment exceeding any reasonable rate of return on investment or the ability to sell the lots at a realistic market price.[7]

The July 18, 1994, amendments to the CAFRA rules and regulations redefined "environmental sensitivity" to include forested sites. This definition changed the environmental sensitivity rating for this property. The definition again changed in August 1996, when forest vegetation was deleted as a criterion for environmental sensitivity. Thus the August 1996, changes caused the environmental value to be restored to one of intermediate environmental value. In August 1996, Mauriello sent a letter to Griffith (Exhibit D-6) advising him under the rules the site would likely receive a medium development potential rating and forty percent allowable site coverage. Mauriello ultimately confirmed that under the current rules the Griffith site could be developed at forty percent site coverage (medium development intensity as per N.J.A.C. 7:7E-5.6) because it is located in a limited growth

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[7] I note, but do not decide, whether construction of the sewer line and/or the size of the internal road network would trigger CAFRA review, since the Court finds that under either scenario development as proposed by the NJDEP is economically infeasible.

region (N.J.A.C. 7:7E-5.3), has a moderate development potential (N.J.A.C. 7:7E-5.5), and low environmental sensitivity (N.J.A.C. 7:7E-5.4). By explanation he determined the site was low environmental sensitivity under the current rules, revised in August 1996, since environmental sensitivity is now based on depth to ground water not on forest vegetation. The site has a moderate potential rating rather than a low rating because it is located in a limited growth region; is within 1,000 feet of a paved road; has soil suitable for onsite sewage disposal (septic); and is within one-half mile of a school and ball fields. Thus it would be considered "in fill" under N.J.A.C. 7:7E-5.5(b)4 which refers to the definition of "developed land" within N.J.A.C. 7:7E-5.5(b)2iii within respect to residential development.[8]

The NJDEP's position, as set forth at trial, suggests that property can be developed, conceivably with sewers, provided there is a restriction on extension of the system, or in the alternative, approximately 40 lots using individual septic systems on the approximate 40 acres of upland. The NJDEP, however, stopped short of guaranteeing any permits based on this new development scenario.

There was also a dispute as to maximum coverage regulations, which impacted upon the number of units which could be built on the property. Plaintiff's expert, Mr. Tombs, testified pursuant to the Coastal Zone Management Rules of August 19, 1996, the NJDEP could limit Plaintiff's property to a maximum three percent total area

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[8] Both Little Egg Harbor Township MUA and the County of Ocean recommended that Plaintiff's 208 amendment application be approved.

allowance for structures and impervious pavement, based upon a literal reading of the rules and regulations. Plaintiff's expert concluded the site would not qualify "in fill" because it is not within one-half mile of a commercial or industrial development of more than 20,000 square feet, pursuant to N.J.A.C. 7:7E-5.5(b)2.iii and that the school and ballfields described by the NJDEP would not constitute a commercial development. Thus the site would have low potential for development and three percent to five percent maximum coverage. Mr. Tombs opined that the three percent maximum limitation would allow a yield of only 5 or 6 lots and thus would render the Griffith property into a state of economic inutility. At a minimum, Plaintiff argues the July 18, 1994, rules were so draconian, as it applied to this particular property, the development potential was not restored until the adoption of the August 1996, rules which would allow some reasonable development of the property.

Kenneth Walker testified the value of the property as of July 1, 1989, was $743,000, and $82,000 as of June 25, 1992 (when a permit was issued for a 16 foot wide road). He further testified that he was not aware of any sales exceeding $60,000 for non-waterfront, one-half to one acre lots in Little Egg Harbor Township or the immediate surrounding area. While the NJDEP has challenged Mr. Walker's comparable sale methodology, the Court finds his methods to be consistent with normal appraisal practices and his opinion is accepted by the Court. The regulatory actions of NJDEP reduced the market value of the property to a *de minimis* amount. The significance of Mr. Walker's testimony is realized when contrasted with the testimony of Mr. Stanton, that is, the market price of

improved residential lots is significantly less than the cost of developing the lot consistent with the permit conditions attached by the NJDEP, or the development schemes the NJDEP has indicated it would approve. The Court accepts the opinion of Plaintiff's expert and finds that if the property cannot be developed for residential use of any type, it has *de minimis* value, effectively, no marketable value.

II

Legal Discussion

Government regulation which prohibits all economically beneficial or productive use of land may constitute a taking for which just compensation is constitutionally required. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16, 112 S.Ct. 2886, 2893-94, 120 L.Ed. 2d 798, 813-14 (1992). When a comprehensive regulatory scheme is claimed to have effected a taking for which the state and federal constitutions require compensation, the Court is required to conduct a fact sensitive examination of the regulatory scheme, with a particular emphasis on whether it substantially advances a legitimate public purpose and whether it excessively interferes with property rights and interests. *Gardner v. New Jersey Pinelands Commission*, 125 N.J. 193, 205 (1991). A property owner does not suffer a taking requiring just compensation if he retains several viable economically beneficial uses of his land. *Gardner, Id.* at 215.

There is no question but that the Pinelands Protection Act; the Clean Water Act; the Freshwater Wetlands Protection Act and the Coastal Area Facilities Review Act all

advance legitimate state and public interests. The prevention of damage to ecologically sensitive lands is a particularly strong and legitimate public interest advanced by these regulations. The question is whether the cost of achieving that salutary benefit should be borne by the public in general, or by one property owner in particular. *Loveladies Harbor, Inc. V. United States*, 28 F.3rd 1171, 1175 (Fed. Cir. 1994).

Thus, the critical question is whether the permissible regulatory activity, which nonetheless advances an important public purpose, impairs to an impermissible degree valuable property rights and interests. *Gardner, supra*, 125 N.J. 193, 210 (1991).

The Plaintiff in *Gardner* was determined to retain a beneficial agricultural use of his property, notwithstanding the draconian restrictions on use imposed by the Pinelands Comprehensive Management Plan. The State's regulatory scheme in this case leaves Griffith with no viable economic use of his property and constitutes an excessive interference with property rights and interests.

A regulatory taking occurs if:

1. There was a denial of economically viable use of the property as a result of the regulatory imposition;

2. The property owner had district investment backed expectations; and,

3. It was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994).

Extraordinary delay or other unreasonable conduct by a regulatory authority may give rise to a claim for a regulatory taking. *Littman v. Gimello*, 115 N.J. 154, 167 (1989).

The concept of "distinct investment backed expectations" was discussed at length in the landmark inverse condemnation decision, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2nd 631 (1978). New York City designated Grand Central terminal a historic landmark, thus preventing its owner from erecting an office tower in the air space above the terminal. The Supreme Court held the decision of New York City, in bestowing historic landmark status, did not constitute a regulatory taking. The Court held the regulatory action did not interfere with the property owner's distinct and reasonable investment backed expectations. One factor in determining whether or not expectations are reasonable will depend on whether the property owner had notice *in advance of its investment decision* that the government regulations which are alleged to constitute the taking had been or would be enacted.

In this case, Griffith clearly had distinct and reasonable investment backed expectations which predated the effective date of CAFRA, the Pinelands Act, or the FWPA. The purpose of entering into the joint ventures was long term capital gain, to hold the property for value appreciation, and to ultimately sell to a purchaser for residential development. These are valid, distinct and reasonable investment backed expectations. Furthermore, the Court is not persuaded that the lands included within the original joint ventures, the Tall Timbers and Holly Lake tracts,

constituted a unitary investment. The property in question was not severed from the other parcels, and it has been consistently treated as an independent parcel. It is not contiguous to the other two parcels sold by Plaintiff for a profit. The fact the Plaintiff may have derived a profit from other land holdings in the vicinity of the subject property should not be a basis for depriving this property owner of his property without just compensation.

There is substantial disagreement between Plaintiff and the NJDEP as to what development, if any, could take place on the property. The Court is satisfied, however, that the failure of the NJDEP to approve the 208 Plan amendment, allowing sanitary sewers to be extended to the property, relegates this property to a septic only option. Pinelands Regulations permit development of residential lots serviced by individual septic.[9] Diminished land value alone does not constitute a taking, nor does impairment of the marketability of land or restriction on uses that may reduce income or profits. A regulatory scheme will be upheld unless it denies all practical use of property or substantially destroys beneficial use of the

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[9] The area is located in a portion of the Pinelands National Reserve which is governed by CAFRA. The NJDEP, in evaluating the CAFRA application, will look to the development intensities permitted under the Pinelands regulations. This appears to be inconsistent with the legislative scheme which recognized the pre-existence of the Pinelands National Reserve at the time that CAFRA was implemented. However, for purposes of this decision, the Court will assume that NJDEP would apply Pinelands land use regulations with regard to this development.

property. *Gardner v. New Jersey Pinelands Commission, supra,* 125 N.J. 193, 210-11.

However, this applicant could not design a plan and obtain development approvals due to the constant shifting of positions by the NJDEP as to their requirements for approval, the multiple changes in the law adopted by the Legislature, and the revisions to regulations promulgated pursuant to these amended laws. These laws and regulations carry a presumption of lawfulness, however, the effect of same on this landowner has been confiscatory. The action of the State agency has deprived this property owner of any viable economic use of his property. Griffith could not satisfy the NJDEP because the relationship was based on laws, rules and regulations in constant flux, and the Agency's interpretation of same also changed, giving little in the way of guidance to the property owner. No development of the property, in the manner suggested by the NJDEP, would result in an ability to sewer and market the property. Application of the environmental regulations to the subject property would entirely frustrate all of the property owner's reasonable investment backed expectations. The regulatory scheme, as applied in this case, was not a mere impairment of marketability or a diminution in land value. It denied all practical use of this property for anything other than open space.

Thus, this Court concludes the effect of the regulatory actions by the NJDEP on these development applications taken as a whole constitutes a regulatory taking of the property without just compensation.

N.J.S.A. 13:9B-22(b) provides:

> If the Court determines that the issuance, modification or denial of a Freshwater Wetlands Permit by the Department pursuant to this Act constitutes a taking of property without just compensation, the Court shall give the Department the option of compensating the property owner for the full amount of the lost value, condemning the effected property pursuant to the provision of the Eminent Domain Act of 19711 [sic] . . . or modifying its action or inaction concerning the property so as to minimize the detrimental effect to the value of the property.

The purpose of N.J.S.A. 13:9B-22(b) is to avoid exposing the State to the risk of acquiring property by the exercise of the power of eminent domain whenever an application for a development permit is denied, modified or issued with conditions. In construing that statute, the Appellate Division has held, " . . . the regulatory scheme governing properties . . . is extremely comprehensive and complex. In entrust a very expansive discretion to the DEP. To require a developer to submit a multiplicity of successive applications in order to attempt to divine, without administrative guidance, what, if any, development of its property will be permitted would be inconsistent with due process of law". See *Loveladies Harbors, Inc. V. United States*, 15 Cl. Ct. 381, 386 (1988), stating, " . . . a party is not required to engage in piecemeal litigation to determine the type of development that will be allowed." *East Cape May v. Department of DEP*, 300 N.J. Super, 325, 340-41 (App. Div. 1997).

N.J.S.A. 13:9B-2 also provides, " . . . in order to advance public interest in a just manner, the rights of

persons who own or possess real property affected by this act must be fairly recognized and balanced with environmental interest". The act therefore requires the Agency to communicate to the property owner a reliable authoritative indication of what kind of development, if any, will be permitted and under what conditions. It is clear in the context of this case that the NJDEP failed to provide specific guidance as to what type of development would be permitted under this regulatory scheme. A permanent taking occurs when the DEP has failed or refused to provide such guidance, or to issue a usable permit to provide access to Nugentown Road. The Court is satisfied that until Mark Mauriello's testimony on September 16, 1997, the property owner received no indication from the DEP as to what type of development, if any, would be permitted on the property. The Court finds the date of taking was June 25, 1992, when the initial FWPA permit was issued.

CONCLUSION

The Court therefore concludes that the effect of the actions of the NJDEP, as it pertains to the facts of this case, constitutes a permanent taking of property. Unless NJDEP avails itself of the safeguards set forth in N.J.S.A. 13:9B-22b, this matter will be set down for a trial on damages 45 days after entry of an order confirming this decision. The order shall direct NJDEP to notify the Plaintiff, within 45 days, of whether it intends to exercise an option provided in N.J.S.A. 13:9B-22(b).

Counsel for Plaintiff shall submit a form of judgment.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-4260-97T1

DARWIN R. GRIFFITH,

Plaintiff-Respondent/
Cross-Appellant,

v.

STATE OF NEW JERSEY
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendant-Appellant/
Cross-Respondent.

Argued January 20, 1999 – Decided May 3, 1999.

(Filed May 3, 1999)

Before Judges Pressler, Brochin, and Kleiner.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County.

Rachel Horowitz, Deputy Attorney General, argued the cause for appellant/cross-respondent (Peter Verniero, Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel; Ms. Horowitz, on the brief).

Seymour J. Kagan argued the cause for respondent/cross-appellant (Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys; Mr. Kagan, of counsel; Dina R. Khajezadeh, on the brief).

PER CURIAM

Defendant, State of New Jersey, Department of Environmental Protection ("DEP"), appeals from a judgment on liability entered by the trial court, pursuant to R. 4:42-2, which found that the DEP had inversely condemned plaintiff Darwin Griffith's sixty-three acre tract in Little Egg Harbor Township as a result of the regulatory permit process as provided in the Freshwater Wetlands Protection Act ("FWPA"), N.J.S.A. 13:9B-1 to -30, and the Coastal Area Facility Review Act ("CAFRA"), N.J.S.A. 13:19-1 to -32. Plaintiff sought a freshwater wetlands permit ("FWP") to fill twenty-three acres of wetlands on the site in order to construct a road to the site's uplands, and a CAFRA permit to construct a forty-four unit single-family residential development on the uplands. After a bench trial limited solely to issues of liability, the trial judge found a taking based on the DEP's shifting regulatory scheme and its failure to provide administrative guidance during the permit process which, according to the court, prevented plaintiff from formulating an acceptable development plan, thereby denying plaintiff economically viable use of his land.

The judgment dated February 18, 1998, memorializing the judge's decision provided, in part:

> 3. The Court finds as a fact and as a matter of law that as of June 25, 1992, the Defendant, State of New Jersey, Department of Environmental Protection, did inversely condemn the subject property, said taking was a permanent taking as of that date.
>
> 4. In the event the Defendant shall exercise its option under N.J.S.A. 13:9B-22(b) same shall be

> exercised in writing within forty-five (45) days of the date of this judgment.
>
> . . .
>
> 6. The trial date on the issue of damages shall take place on June 15, 1998, before this Court.

Defendant filed a notice of appeal from the final liability judgment and moved to stay the judgment pending appeal. Plaintiff filed a cross-appeal contending that the date of the permanent taking should have been July 19, 1989, and further contending that the trial judge erred in failing to characterize defendant's action as constituting "extraordinary delay." The trial judge denied defendant's motion to stay the judgment pending appeal. On May 27, 1998, we: (1) granted defendant's emergent motion to stay the trial court's judgment; (2) granted defendant's motion for leave to appeal the trial court's liability judgment; and (3) granted plaintiff leave to cross-appeal.[1]

On appeal, defendant raises the following points of error:

> POINT I
>
> THE TRIAL COURT'S DETERMINATION OF A TAKING WAS CONTRARY TO THE BINDING, PREVIOUS DECISIONS OF THIS COURT IN TWO RELATED APPEALS AND TO BASIC TAKINGS JURISPRUDENCE

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[1] Our order directed the parties to address in the appeal whether condemnation commissioners would be required if the judgment on liability was affirmed. Our decision to reverse the trial court judgment renders this additional issue moot.

POINT II

THE TRIAL COURT ERRED IN DECIDING THERE WAS A TAKING BECAUSE NJDEP DID NOT FORMALLY STATE BEFORE TRIAL THE PRECISE DEVELOPMENT IT WOULD APPROVE

POINT III

THE TRIAL COURT ERRED IN CONCLUDING THAT WHERE 24 UNITS COULD HAVE BEEN BUILT ON 63 ACRES, THERE WAS A TAKING

A. The Trial Court Erred in Concluding that the "Parcel as a Whole" Was Limited to Block 78, Lot 33, and in Failing to Consider Griffith's Reasonable Expectations as of the Date Block 78, Lot 33 Was Created

B. The Trial Court Erred in Finding a Taking on the Basis of Expert Opinion Which Lacked a Factual Basis

C. The Trial Court Erred in Considering the Failure to Include the Site in a Sewer Service Area in its Takings Analysis

POINT IV

THE TRIAL COURT ERRED IN FINDING THERE WAS A PERMANENT TAKING, BUT DECLINING TO FOLLOW THE PROCEDURES REQUIRED BY THE EMINENT DOMAIN LAW TO ESTABLISH JUST COMPENSATION

Plaintiff, in his cross-appeal, contends that:

THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE NJDEP'S ACTIONS CAUSED

EXTRAORDINARY DELAY FROM AT LEAST JULY 19, 1989 THROUGH JUNE 25, 1992, RESULTING IN THE INVERSE CONDEMNATION OF PLAINTIFF'S PROPERTY AS OF JULY 19, 1989.

We reverse. We conclude that the trial judge erred when she declared the judgment on liability a final judgment pursuant to R. 4:42-2. Once the judge recognized that N.J.S.A. 13:9B-22b was applicable to these proceedings, defendant should have been afforded the opportunity to utilize that statute to ameliorate, either partially or in full, its potential liability exposure. Until defendant was afforded a reasonable opportunity to reduce its potential liability, the judgment should have been deemed interlocutory. Because of our conclusion, we need not at this time address defendant's specific points of error, or plaintiff's point of error in his cross-appeal.

A.

In a complaint dated July 19, 1995, plaintiff contended that defendant's action caused a taking by inverse condemnation of his property between July 19, 1989, and June 25, 1992. Plaintiff asserted that defendant's action "violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution, violated his substantive and procedural due process and equal protection rights thereunder and violated his rights under Article I, Paragraph 20 of the New Jersey Constitution." Plaintiff specifically demanded issuance of an order compelling defendant "to condemn the subject property pursuant to N.J.S.A. 13:9B-22(b) and the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1

et seq., or alternatively, an Order compelling [defendant] to pay . . . compensatory damages [for the temporary taking] and compelling [defendant] to issue plaintiff a reasonably conditioned Freshwater Wetlands Permit forthwith, punitive damages, and attorney's fees and costs of suit [arising from his complaint and incurred in related administrative proceedings]."

The certification attached to plaintiff's initial complaint, R. 4:5-1(b)(2), averred, in part:

> The Freshwater Wetlands Permit issued to Plaintiff on June 25, 1992, is the subject of a pending action in the Superior Court of New Jersey, Appellate Division, under Docket No. A-006024-93T2.[2] The cancellation of Plaintiff's application for a CAFRA permit and the disapproval of Plaintiff's requested 208 Amendment to the Ocean County Water Quality Management Plan are the subject of a pending action in the Superior Court of New Jersey, Appellate Division, under Docket No. A-002667-94T5.[3]

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[2] In a *per curiam* decision dated May 24, 1996, in Docket No. A-6024-93T2, we reversed and remanded defendant's administrative decision denying plaintiff's FWP and directed an FWP be issued in accordance with our opinion. Our opinion contained a footnote: "Based on our decision, we need not comment on petitioner's contention that DEP's refusal to issue a reasonably conditioned permit for his requested access is tantamount to a taking of property without just compensation in violation of the Federal and State Constitutions."

[3] In a *per curiam* decision, dated May 24, 1996, in Docket No. A-2667-94T5, we affirmed the DEP's decision canceling plaintiff's CAFRA permit and dismissed his appeal from the disapproval of the 208 plan amendment and the disapproval of his mitigation plan. We affirmed the cancellation of the CAFRA

In a second amended complaint dated June 25, 1996, and filed on October 2, 1996,[4] plaintiff repeated his original complaint but added a demand for relief seeking a declaration that plaintiff's "application for a CAFRA permit was complete under the Rules on Coastal Zone Management prior to the July 18, 1994 amendments thereto," and alternatively demanding in Count Five that by reason of our *per curiam* decision in Docket No. A-2667-94T5, on May 24, 1996, which affirmed the defendant's decision to cancel plaintiff's CAFRA permit application and to disapprove plaintiff's Water Quality Plan Amendment application, the taking that plaintiff alleged to have occurred on July 19, 1989, had continued beyond June 25, 1992.

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application because of plaintiff's refusal to comply with the agency's requests. With respect to the 208 plan, we held that plaintiff was precluded from challenging defendant's decision because he failed to exhaust his administrative remedies by asking for a hearing after defendant disapproved plaintiff's amendment plan.

Additionally, in reaching our conclusion, we noted that plaintiff was not precluded from submitting a new amendment proposal in conjunction with any future CAFRA application. Similarly, with respect to the mitigation plan, we held that the issue was not ripe for review because plaintiff had not exhausted his administrative remedies by requesting an administrative hearing.

Moreover, we concluded that defendant did not unduly delay its review of plaintiff's plan. Although plaintiff had submitted the plan in 1988, defendant did not have to evaluate the plan until after it awarded plaintiff the FWP and defendant's evaluation of the plan during its pre-application review of his CAFRA permit application was not unreasonably delayed.

[4] The appendices on appeal do not contain a copy of plaintiff's first amended complaint nor is the date of filing of the first amended complaint reflected within the appendices.

It is clear that, despite the specific holding in Docket No. A-2667-94T5, plaintiff did not file any new or amended application with defendant but merely recited within his second amended complaint that the very action which we had affirmed extended the temporary taking which plaintiff alleged in his original complaint.

B.

The FWPA was enacted on July 1, 1987, to be effective July 1, 1988. The Act's purpose is to "establish a program for the systematic review of activities in and around freshwater wetland areas designed to provide predictability in the protection of freshwater wetlands" and to "preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." N.J.S.A. 13:9B-2. By enacting this legislation, New Jersey assumed jurisdiction over freshwater wetlands from the Army Corps of Engineers. *Ibid.*

As part of the FWPA, the Legislature has enacted a statutory mechanism, N.J.S.A. 13:9B-22b, to protect property owners of "land affected by a freshwater wetlands permit issued, modified or denied." N.J.S.A. 13:9B-22a.

N.J.S.A. 13:9B-22b provides:

> If the court determines that the issuance, modification, or denial of a freshwater wetlands permit . . . constitutes a taking of property without just compensation, the court shall give the department the option of compensating the property owner for the full amount of the lost value, condemning the affected property pursuant to the provisions of the "Eminent Domain Act of 1971," P.L. 1971, c. 361 (C. 20:3-1 *et seq.*),

> or modifying its action or inaction concerning the property so as to minimize the detrimental effect to the value of the property.

As we view this statute, it seems clear that a judgment of liability may not be entered without first affording the DEP an opportunity to ameliorate a property owner's alleged loss attributable here to the denial of a FWP. As we noted in *East Cape May v. Department of Envtl. Protection*, 300 N.J. Super. 325 (App. Div. 1997),

> One purpose of N.J.S.A. 13:9b-22b is obviously to avoid exposing the State to the risk of having to acquire property by the exercise of the power of eminent domain whenever an application for a development permit is denied. We are obligated to construe the statute to effectuate that purpose. It can and should be effectuated by interpreting the statute to mean that the administrative process leading to the issuance or denial of a development permit is not complete until the State has had the opportunity to decide whether the application of the regulations to a particular property should be relaxed pursuant to N.J.S.A. 13:9B-22b to avoid a taking.
>
> [*Id.* at 340.]

When N.J.S.A. 13:9B-22b is read in conjunction with R. 4:42-2, which provides, in pertinent part, that "The trial court may direct the entry of final judgment upon fewer than all claims as to all parties, *but only in the following circumstances*: . . . (2) upon complete adjudication of all of the rights and liabilities asserted in the litigation as to any party," (emphasis added), it is obvious that the trial judge's decision here must be deemed interlocutory until

defendant is permitted to utilize the "safety-valve" provisions of N.J.S.A. 13:9B-22b. *See East Cape May, supra,* 300 N.J. Super. at 339.

On remand, the trial judge shall specifically provide defendant a reasonable opportunity to explore methods to ameliorate plaintiff's alleged loss attributable to the denial of the FWP. We also perceive the trial judge may find it necessary to permit additional testimony of witnesses presented by both parties on the amelioration issue.

Reversed and remanded for further proceedings consistent with this opinion or as deemed necessary within the trial judge's discretion.

Superior Court of New Jersey

CHAMBERS OF [SEAL] OCEAN COUNTY COURT
MARLENE LYNCH FORD HOUSE
P.O. Box 2191
TOMS RIVER, N.J. 08754-2191

January 31, 2000

Seymour J. Kagan, Esq.
Berry, Kagan, Sahradnik & Kotzas
212 Hooper Avenue
Toms River, NJ 08753

Peter Verniero, Attorney General of New Jersey
Hughes Justice Complex
25 Market Street
CN 093
Trenton, NJ 086225-0093
Attention: Rachel Horowitz, Deputy Attorney General

RE: ***Darwin R. Griffith v. State of New Jersey Department of Environmental Protection*** **Docket No. OCN-L-2456-95**

Dear Counsel:

This matter came before the Court for a remand hearing from the Appellate Division.

This is an inverse condemnation case. The plaintiff alleges the State of New Jersey, through the Department of Environmental Protection and Energy (hereinafter referred to as the "NJDEPE"), effected a regulatory taking of plaintiff's property, known as "Tall Cedars", a 63+ acre tract of vacant land, located in Little Egg Harbor Township, Ocean County. In this Court's written opinion dated February 11, 1998, the Court agreed that the conditions attached to an NJDEPE freshwater wetlands permit dated

June 25, 1992 indeed constituted a regulatory taking of plaintiff's property, triggering either the option to ameliorate the taking, by operation of N.J.S.A. 13:9B-22(b), or an award of just compensation for the value of the property taken.

The Court bifurcated the issues of liability and damages and the parties appealed the interlocutory decision of the Court on the issue of liability. The Appellate Division determining that the decision on liability was interlocutory and thus not a final decision ripe for appellate review, remanded and directed the Court to afford the State a reasonable opportunity to explore the avenue of amelioration of the taking in order to avoid payment of constitutionally mandated just compensation.

The Appellate Division, in reviewing the entirety of the judgment of the Court, determined:

> "We conclude that the Trial Judge erred when she declared the judgment on liability a final judgment pursuant to R. 4:420-2. Once the Judge recognized that N.J.S.A. 13:9B-22(b) was applicable to these proceedings, defendant should have been afforded the opportunity to utilize the statute to ameliorate, either partially or in full, its potential liability exposure. Until defendant was afforded a reasonable opportunity to reduce its potential liability, the judgment should have been deemed interlocutory. Because of or conclusion, we need not at this time address defendant's specific points of error, or plaintiff's point of error in his cross appeal."

The issue of amelioration has apparently become moot, as both parties concede an offer of amelioration, negotiated between the parties in the interim, satisfies the

requirements of N.J.S.A. 13:9B-22(b). However, the parties still dispute whether or not plaintiff is entitled to just compensation for a temporary taking of property, from June 26, 1992, until the effective restoration of the property to plaintiff. The decision of the Court is thus limited to a resolution of whether a temporary taking of property has occurred, and if so, what constitutes fair and just compensation for the taking.

I. The Temporary Taking Issue

The NJDEPE has made a bona fide offer to ameliorate the regulatory taking by offering all state permits needed to effectuate development of a 44 unit residential subdivision; have waived application and other fees equivalent to $80,000 and argue that the plaintiff, by that action, has been made whole, getting what he would have gotten but for the determination of a regulatory taking of June 26, 1992. The State further argues that plaintiff has suffered no damages by the taking, since market conditions from 1992 until 1999 were such that there was no market for this property.

Plaintiff, relying upon the landmark Supreme Court decisions in *First Evangelical Church v. Los Angeles County*, 482 U.S. 304, 1007 S. Ct. 2378, 96 L.Ed.2d 250 (1987) and *Nolan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 311, 97 L.Ed.2d 677 (1987) maintains he is entitled to fair and just compensation for the loss of the use of his property and carrying costs incurred during the tenure of the State's appropriation, albeit temporary, of this property.

Plaintiff further seeks damages for out of pocket expenditures he incurred as a result of attempts to obtain the 1992 permit. Plaintiff testified as to the expenditures he had incurred in connection with the attempted development of the property. The Court allowed, but limited for later use, testimony pertaining to counsel fees, since the right to counsel fees in a condemnation matter would depend upon the success of the plaintiff in proving that the temporary taking had occurred.

This dispute underscore a recurring public property dispute involving the appropriate balance to be obtained between legitimate State interests in protecting and preserving the environment and the rights of private property owners to be secure in their right to private property ownership. The tension of this debate was better stated by the Federal Court of Appeals for the Federal Circuit:

> " . . . [W]hen the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining the public benefit fall solely upon the affected property owner, or it is to be shared by the community at large. In the final analysis the answer to that question is one of fundamental public policy. It calls for balancing the legitimate claims of the society to constrain individual actions that threaten the larger community, on the one side, and on the other, the rights of the individual and our commitment to private property as a bulwark for the protection of those rights. It requires us to decide which collective rights are to be obtained at collective cost, in order better to preserve collectively the rights of the individual. The role of the court is to implement and enforce that public policy as it appears in governing law, in this

> case in the words of the Constitution and the controlling pronouncements of the Supreme Court." *Loveladies Harbor, Inc. v. U.S.*, 28 F. 3rd 1171, 1175 (Fed. Cir. 1994).

This Court has previously determined, for the reasons set forth in the letter opinion dated February 11, 1998, that the effect of a 1992 Freshwater Wetlands permit issued to plaintiff with conditions attached which rendered the property devoid of any reasonable economic return coupled with protracted delays in the approval process, was a regulatory taking on the date of the permit, June 25, 1992.

In *First Luthern Church, supra,* the United States Supreme Court addressed the question of whether a declaration of invalidity for a regulation was enough to ameliorate a regulatory taking, thus restoring the property rights and denying a claim for just compensation. Recognizing the concept of a temporary taking, the Court held that constitutional notions of fair and just compensation, in the face of a temporary taking, requires just compensation from the date of the confiscatory regulatory action until the date of the regulations rescission or amendment. *First Lutheran Church v. Los Angeles County, supra,* at 319, 107 S. Ct. At 2388.

Logic would suggest that the same principles should apply where property ownership is effectively restored after a regulatory taking because of the effect of the state's decision to ameliorate pursuant to the provisions of N.J.S.A. 13:9B-22(b). When the Legislature adopted the Freshwater Wetlands Protection Act and specifically incorporated a provision which would allow the state to negate a finding of a regulatory taking, it did so within

the context of the evolutionary nature of constitutional law as it applied to takings of property, even for temporary periods, based upon inverse condemnation. The legislative intent in adopting the 22(b) option as a provision of the Freshwater Wetlands Act was clearly to protect the state and the taxpayers who fund it from regulatory taking claims and the liability for judgments based upon such theories. Section 22(b) is the statutory equivalent to the regulatory recision or amendment referred to in *First Lutheran Church, supra.*

Thus, for the purposes of this decision, I find that the plaintiff is entitled to fair and just compensation from the date of the regulatory taking until an effective exercise of the amelioration option by the NJDEPE pursuant to N.J.S.A. 13:9B-22(b).

Plaintiff argues he is entitled to receive compensation for a temporary taking to the date all State development permits are issued. The property owner fears that a regulatory agency would be more compelled to act in good faith on the full complement of development applications for necessary development permits if the threat of economic sanctions continued to loom. Such a consideration, however, has no place in the determination process for just compensation. If such a policy were adopted, the effect would be to place the property owner in a *better* position than he had been in if the objectionable regulatory action, in this case a Freshwater Wetlands permit so hobbled by conditions as to be meaningless, had not occurred. Such a public policy determination is best left to the Legislature. The purpose of just compensation is to make the property owner whole, not to enhance the financial position of the property owner.

The goal of damages in an inverse condemnation case is to restore the property owner, through the economics of money, to the position he was in before the regulatory taking. Once the State exercised its section 22(b) option, by offering approval for a wetlands crossing enabling road access to a 44 unit residential development, coupled with a reasonable review and response period by the applicant, the property owner was restored to the *status quo ante*.

Based upon the 22(b) offer, and a reasonable review period by the applicant, as well as the testimony and evidence offered at the remand hearing, I find the termination date of the temporary taking to be *September 1, 1999*. On or about this date, the property owner was restored to all of the elements of his property ownership through the state's exercise of the 22(b) offer.

II. Fair and Just Compensation for the Temporary Taking

In support of his claim for compensation, plaintiff called as his witness Anthony Graziano, a licensed real estate appraiser doing business in the Ocean County area. Mr. Graziano's qualifications as an appraisal expert were accepted by the Court. Mr. Graziano's analyzed the value of the subject property using principles of retrospective valuation. In a retrospective valuation, the appraiser considers the condition of the property on the taking date and disregards changes in value that occurred subsequent to that date, even though subsequent events could have verified or negated an opinion on valuation.

Consistent with appraisal principles recognized under the "Uniform Standards of Professional Appraisal Practice' (Exhibit P-104), Mr. Graziano concluded the highest and best use of the subject property on June 25, 1992 was for residential development of 44 conforming lots. The opinion accepted that the property had access problems, most notable, the need to obtain NJDEPE approval of a wetlands crossing permit in order to access the upland, developable portions of the property. His analysis assumed that a reasonable approval would have been granted within a reasonable time period. In other words, the hypothetical 1992 purchaser of the property would have had a reasonable expectation that, given the access problems to this property, the location of the wetlands and the lack of suitable alternative access to the property, there was a substantial likelihood that the owner of the property in question would have received a permit to construct a wetlands crossing for access. The expert further opined that given the level of design work on the property in 1992, it was highly probably that a reasonable local land use board would have approved the property to accommodate 44 conforming residential lots, and that there would be sufficient land suitable for on site wetlands mitigation to compensate for the loss of approximately .5 acre wetland displacement to build the access road.

The plaintiff's expert concluded the subject parcel, although vacant unimproved and unapproved land, was value enhanced by completed preliminary engineer and environmental analyses. A potential buyer would have enjoyed a certain comfort level with the development

potential for this property, and would have attached value to that prospect.

Mr. Graziano opined that as of June 1992, the Ocean County real estate market was coming out of a recession, and interest rates were at their lowest levels in a decade.

With the benefit of hindsight, we now know that the real estate market, especially in this southern section of Ocean County, continued to be in a severely depressed market from 1992 until 1995. Unknown to many investors and developers, the federal agencies which regulated failed savings and loans and banking institutions had acquired vast amounts of real property through defaults. According to Mr. Graziano, the Resolution Trust Corporation was under pressure to liquidate its land holdings in short order. Graziano conceded the full effects of the Savings and Loan bailout bill were not fully realized, because by 1992 federal regulatory agencies initiated massive liquidations of properties that they held as a result of the failures of numerous banks and savings and loans. These financial institutions were economically victimized by corporate and individual defaults on loans under secured by real estate plunging in value. It was not until the latter part of 1992 into 1993 that the full effect of the liquidation of these foreclosed properties upon the market was realized. In June of 1992, according to the opinion of this expert, the reasonable investor could not have anticipated the domino effect of corporate and individual loan defaults, bank failures and the devaluation of real property. Thus the reasonable purchaser in June 1992 would not have predicted the real estate market would have been flooded with low priced properties available at distress values. Mr. Graziano determined the fair market

value of the property in question as of June 1992, without regard to the later depression of real property values which occurred from 1993 to late 1995.

Mr. Graziano thus concluded the subject property's value, as of June 25, 1992, would have been $440,000.

This opinion, a retrospective valuation, assumed the property was physically adaptable to 44 residential conforming lots; that the housing market was recovering from a major recession; that interest rates were favorable, at the lowest levels in a decade, which factors were conducive to the development potential of the land. The hypothetical purchaser in 1992 would be inclined to pay, and a willing seller to sell the property in question, for approximately $440,000.

The NJDEPE relied upon the testimony of its real property appraiser, George W. Powell, Jr.. Also, Mr. Powell's qualifications as an expert in real estate appraisal were accepted by the Court, without objection by the plaintiff.

For vacant properties, Mr. Powell opined that the highest and best use analysis is a single step process, the property is analyzed under the four criteria of physical possibility, legal permissibility, financial feasibility and maximum profitability. As to the list criteria, physical possibility, Mr. Powell found the subject a 65 acre tract of land consisting of approximately 23 acres of freshwater wetlands and 42 acres of uplands, heavily treed and located along Nugentown Road. Municipal water would require an approximate 1,000 feet extension to the site and Mr. Powell assumed the upland soils were adequate to support a septic system.

The property is located outside the 208 Water Quality Plan for sewer service, although the local MUA had endorsed an extension of the 208 Water Quality Plan to service the subject property. However, on May 5, 1994, the expert noted that the NJDEPE had denied the 208 Water Quality Plan amendment proposed by Little Egg Harbor Township MUA, which would have authorized an extension of water and sewer services to the property.

The property was locally zoned to allow for residential development in the capacity proposed by the applicant.

Both experts concede that the property would require CAFRA approval.

The expert also considered, in addition to the legal obstacles to development, the financial feasibility of the project. He noted housing demand in the area was sporadic, although the testimony on the demographics indicated that the population of this community had nearly doubled in the decade of the 1980's, the population growth was centered in a different part of the Township. The subject site was competing with other tracts of land in the northwestern and northeastern sectors of Little Egg Harbor Township that were less expensive to develop, in that utilities were closer and there were no freshwater wetland considerations. The expert concluded that the highest and best use of the property, consistent with the opinion of Mr. Graziano, was for residential development of single family detached dwellings optimally at 44 units for the site.

Mr. Powell also concluded that the cost approach to valuation and the income approach were not useful in

analyzing the value of this property, since neither was helpful with regard to vacant undeveloped land. As with Mr. Graziano, he used the comparable sales method, and arrived at a valuation of 65 acres @ $2,500 per acre for a fair market value of $162,500.

While the State's expert testified he also used a retrospective valuation of the property, it is evident that many of his comparable sales were not truly comparable to the subject. Some sales were the product of less than arms length transactions; others were influenced by a realization of market conditions which ultimately affected all property values in the area, but not clearly evident in June 1992.

Real property valuation is not an exact science. We recognize, however, certain individuals, given their education, work experience, educational and practical training, are qualified to render opinions about the value of real property. Often the valuation of property is subject to market conditions or other intangibles. It is often the product of the evaluation of empirical data, but viewed in the context of the expert's feel for the property and the market, and general knowledge about how individuals buy and sell real estate. In order to be acceptable as evidence, an appraisal, like any other testimony or opinion evidence, must be based upon some foundation of credibility and acceptability within the discipline. It must reflect also some intrinsic common sense in order for a fact finder to afford it credibility.

Mr. Powell did not value the property based upon expected lot yield. He did not consider certain intangible value of the property because of the soft cost investment

in the property, and in the opinion of the court, tainted his opinion to a certain extent because he had the benefit of hindsight, that is, the knowledge of the unusual market conditions affecting real estate from 1993 until 1995. For that reason, I am inclined to discount, although not reject completely, his opinion as to the value of the property in question.

On the other hand, Mr. Graziano's valuation of the property at approximately $10,000/unit or $440,000 is far too optimistic a valuation, given the fact that approvals were not obtained. I agree a reasonable investor would have considered the soft cost investments of preliminary site plan, engineering, environmental and surveying work as an enhancement of the value of the unapproved vacant land. If approved, the property in 1992 could have commanded a price of $10,000 per unit. This was unapproved land, but it also was land that had a reasonable prospect of major subdivision approval. While not a factor which alone should dictate fair market value, it clearly is a factor which would induce a reasonable and informed purchaser on June 25, 1992 to pay a premium for this property. This was land more than raw, unimproved land, but certainly less than approved for residential subdivision use.

I am not bound, as the fact finder, to the opinions of the experts on value. Given the testimony presented, the status of the property, the potential of this property for residential subdivision in the approximate area of 44 lots, I find a more fair and accurate value of the property on June 25, 1992 to have been $8,000 per potential residential housing lot, or about $352,000.

Normally vacant unapproved land is valued on the basis of per acre not on the basis of anticipated residential lot yield, but such valuation methodology would run counter to the common experience of the typical land developer, who often makes substantial investments in preparation to subdivision approvals. Here, where the property is a mix of developable uplands and undevelopable wetlands; where there is a specific plan for the configuration of a residential subdivision, and where there has been substantial financial investment in the soft costs in preparation for development, I find it credible that a reasonable, prudent and informed developer/investor/purchaser would consider the potential realistic yield from the property, would discount for approvals, and would then negotiate price based upon a reasonable certainty of ultimate approval. It is common practice in the purchase of these types of lands to construct a real estate contract where price is contingent upon lot yield. Such considerations are reasonably probative of fair market value in a condemnation matter, certainly factors a reasonable buyer could have taken into account in calculating fair market value. *State D.E.P. v. Fairweather*, 298 N.J. Super. 421, 427 (App. Div. 1997), *State v. F & J Partnership*, 250 N.J. Super. 19, 26 (App. Div. 1991).

III. Calculation of Fair and Just Compensation

Plaintiff calculated his damages based upon the lost investment opportunity as interest at a rate of at ten percent per annum, additional damages related to the extra expense of litigation and attorneys fees, and concluded fair and just compensation to August 1, 1999

would be $1,315,011. See P-105 in evidence. Plaintiff concedes a credit of $400,000 for restoration value.

Plaintiff submitted a detailed written computation of damages as of August 1, 1999. Based upon a June 25, 1992 valuation of $440,000, plaintiff seeks compensation for a temporary taking for the loss of use of his investment, as a result of the inability to develop or sell the property. Plaintiff is seeking compounded interest at 10% per annum on the principle of $440,000. Compounded annual interest from July 25, 1992 until September 1, 1999 would according to the plaintiff compute to $433,297. To that figure the plaintiff has added the fair market valuation of the land of $440,000.

As a result of this decision and the exercise of the State of the option to ameliorate the taking, plaintiff's property rights have been effectively restored as of September 1, 1999. Therefore, any amount due the plaintiff is subject to a credit for the fair market value of the subject property as of the date of restoration, or rescission of the regulatory taking. Both experts essentially agree that the range of the property value just prior to September 1, 1999 was between $400,000 (Graziano) and $440,000 (Powell), and both concede the difference in value is insignificant.

I therefore find the value of the property at the time of restoration, September 1, 1999, was $400,000.

Plaintiff is entitled to receive compounded interest on the loss investment opportunity for the compensation he would have received for the taking of his property. The State concedes, if damages are to be awarded, the

property owner is also entitled to reimbursement for property taxes paid.

There are numerous indices by which a reasonable rate of return on a regulatory taking could be calculated. With hindsight, we know a reasonable investor could have realized during the years in question a rate of return higher than ten percent per annum, and in other years a lower rate of return. The investment expectations with this property, however, according to the testimony of the plaintiff, were long term. In fixing a rate of interest, the court may take into consideration the larger investment return picture in that a reasonable investor would look to the loner [sic] rate of return.

In a condemnation action, the property owner is entitled to interest on an award consistent with N.J.S.A. 20:3-31, which provides:

> "Interest as set by the court upon the amount of compensation determined to be payable hereunder shall be paid by the condemnor from the date of the commencement of the action until the date of payment of the compensation . . . "

In a temporary taking of property, plaintiff is made whole be restoring the lost use of that asset, and the award of interest accomplishes this objective. Interest measures the loss of use of that asset, or the compensation otherwise derived from a sale of that asset. Therefore, the plaintiff's measure of damages in a case like this is interest from the date of the taking to the date that the property was effectively restored or returned to the plaintiff, in other words, from June 25, 1992 until September 1, 1999. Furthermore, the plaintiff, as in any other eminent

domain proceeding in entitled to interest at the "prevailing commercial interest rate." *Township of Wayne v. Cassatly*, 137 N.J. Super. 464, 474-475 (App. Div. 1975), certif. Denied, 70 N.J. 137 (1976). *Jersey City Development Agency v. Clean-O-Mat Corp.*, 289 N.J. Super. 381, (App. Div.), certif. denied, 147 N.J. 262 (1996).

The Court is not bound by the commonly used judgment interest rate, although in some circumstances that rate of interest would be entirely appropriate.

The question then is what is the reasonable rate of return for interest on a temporary taking of the plaintiff's property as of June 25, 1992, when the Court determined that the fair value of the property on that date would have been $352,000?

Plaintiff has asked the Court to fix the interest rate at ten percent (10%) per annum. Plaintiff introduced into evidence a chart setting forth the rates of return for various corporate bonds (as reported in the Standard and Poor's Bond Guide January issues, set forth as part of P-102), which bonds were rated BB- to A+ and reflected returns from 9.32% for Chrysler Corp Notes in 1997 maturing in August 1999 to 14.07% for Chrysler Corp Notes issues 1992 and maturing March 1993. There is no exact mathematical equation with which to calculate a fair and reasonable rate of return, but I do find the reasonable investor, assuming moderate risk and placing his funds in a diversified corporate bond portfolio, would have expected to realize a return of 10% per annum on such an investment during the critical time period of this case. The Court is not bound by any particular interest rate assumption. The prime rate, other stock, mutual fund

and investment indices, or the rate of return for the State's Cash Management Account all provide appropriate guidance. However, after carefully considering all of the evidence presented, I find that a 10% rate of return would best indemnify the condemnee for the temporary taking and the lost investment opportunity.

In fixing a reasonable rate of interest, I am also permitted to consider the time period within which the interest is to run, which in this case, is from June 25, 1992 until September 1, 1999, when the substantial use of the property was effectively restored to the plaintiff, or 7 years and 68 days. From 1992 until 1999, it would be fair to say, consistent with the testimony presented even by the appraisers as well as taking judicial notice, that interest rates were relatively stable and low, whereas investments in securities, bonds, high quality stocks and index rated mutual funds rose in a fashion unprecedented in our economic history. During the same time frame, real estate values were relatively stable.

The purpose of the interest rate rule is to freeze the status of the plaintiff as if the just compensation had been paid. Therefore, given due consideration for the factors set forth above, the various possible indices, the rate of return on bonds, the judgment rate of interest set forth in the applicable court rule, the length of time during which the taking occurred, and the recognized stable interest rates versus the relatively low risk associated with security backed investments during the same time period, and also recognizing a reasonable investor would in all probability have invested in a portfolio of mixed investment products, I do find that the rate proposed by the plaintiff is fair and reasonable.

Attached hereto as Exhibit A is a calculation of interest on a principle amount of $352,000, compounded annually at a rate of return of 10%, indicating total principle plus interest of $698,732.

Since the property was effectively restored to the plaintiff, the State is entitled to a credit in the amount of $400,000, representing the fair market value of the property on the date of restoration of effective ownership of the property. As part of the amelioration effort, the state has agreed to waive certain wetland mitigation fees and application expenses. The plaintiff concedes the NJDEPE is entitled to a credit of $80,000 (as stipulated between the parties) since the amelioration proposal waived all application fees for NJDEPE development permits.

Plaintiff is also entitled to reimbursement for property taxes paid plus ten percent interest during the period of temporary taking. Plaintiff calculated property tax payments plus interest to August 1, 1999 (actually representing payment of local property taxes through September 1, 1999, since the payment due on August 1, 1999 represents payment for the third quarter of that year.) For this element of damages, plaintiff testified he seeks reimbursement in the amount of $46,118, and the Court accepts this amount and the testimony and rationale supporting it.

Plaintiff also seeks compensation for " . . . the access road cost unduly imposed by the NJDEPE" and for " . . . Subdivision Cost Unduly imposed by the NJDEPE." Since the Court's rationale in part in finding a regulatory taking of the property occurred as a result of the protracted approval process endured by the applicant, to allow an

additional recovery based on these theories would be a duplication of the compensation already awarded to the plaintiff. Therefore, since these claims are part of the regulatory taking theory underlying the just compensation, and since in any event such expenses would have been expected to be incurred in the normal development of the property, and the attendant negotiations that occur with developmental review agencies at all levels, the Court is denying these claims for compensation. Furthermore, I find in the absence of any ability to segregate normal development application expenses from condemnation related counsel fees, the Court would be left to speculate as to these expenses.

Finally plaintiff seeks compensation for "complaint costs", which appears to be another way of requesting attorney fees and expenses incurred in connection with the prosecution of this inverse condemnation case.

The Court recognizes as a proper item of recovery in an eminent domain proceeding attorneys fees and reasonable costs for experts and fees attendant to presenting a successful condemnation proceeding. The State questions whether counsel fees are permitted in an inverse condemnation case such as this. If counsel fees are warranted, it is within the discretion of the Court to consider condemnation generated counsel fees and costs. During the remand hearing I permitted the plaintiff to address issues of counsel fees and costs, in a limited way, in order to place in context the other fees requested. However, I also reserved the right of the State to contest the imposition of such fees, and secondly, to consent and address the quantum of fees to be awarded, if any. The Court determined the issue of counsel fees and costs was appropriate for

consideration only after a final determination of whether or not just compensation was due the plaintiff as a result of a temporary taking of the property. Having determined that issue in this opinion, the issue of counsel fees is now ripe for determination.

Therefore, consistent with my ruling during the remand hearing, counsel for the plaintiff shall submit any additional certification of services in support of his application for counsel fees, separating out counsel fees incurred as part of the inverse condemnation action only, and costs and fees incurred in connection with same. Counsel for the NJDEPE shall have 30 days within which to respond to that submission, in writing, and if requested by either party, the matter shall be set down for oral argument on the issue of the right to counsel fees, and the amount of counsel fees and costs. If no oral argument is requested or same is waived by the parties, the matter will be decided on the papers submitted.

In summary, the Court finds that fair and just compensation for the temporary taking, representing the lost investment opportunity at a commercially reasonable rate of interest at 10% compounded per annum, to be $298,732, plus property taxes and annual interest in the amount of $46,118, less a credit of $80,000 as agreed by the parties representing the value of application fee waivers, for a net amount of $264,850 as of September 1, 1999 due to plaintiff, as set forth more fully on Schedule A annexed hereto.

Counsel for the Plaintiff shall prepare an appropriate form of judgment, leaving a paragraph with blanks for counsel fees. The Court will not execute the judgment

until after the counsel fee hearing when both parties shall have an opportunity to be heard on that issue.

Very truly yours,

/s/ Marlene Lynch Ford
Marlene Lynch Ford, J.S.C.

MLF/jc
Attachment: Schedule A

SUPREME COURT OF
NEW JERSEY
C-41 September Term 2001
51,531

DARWIN GRIFFITH,

Plaintiff-Petitioner,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant-Respondent.

ON PETITION FOR CERTIFICATION

(FILED Sept. 10, 2001)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6079-99 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of September, 2001.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Constitution, Article I, § 20.

Private Property for public use

20. Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

Section 13:9B-22(b) of the New Jersey Freshwater Wetlands Protection Act.

b. If the court determines that the issuance, modification, or denial of a freshwater wetlands permit by the department pursuant to this act constitutes a taking of property without just compensation, the court shall give the department the option of compensating the property owner for the full amount of the lost value, condemning the affected property pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C. 20:3-1 et seq.), or modifying its action or inaction concerning the property so as to minimize the detrimental effect to the value of the property.

L.1987, c. 156, § 22, eff. July 1, 1988. N.J. Stat. Ann. § 13:9B-22(b)

Let's Protect Our Earth
[SEAL]
State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TRENTON

Division of Coastal Resources

July 19, 1989

R. Jacob Hikmat
Fellows, Read & Associates, Inc.
310 Main Street
Toms River, NJ 08753

RE: Individual Freshwater Wetlands Permit Denial
Applicant: Darwin Griffith
Project name: Tall Cedars
BFW File No. 1516-880052.1-IP
Block 78; Lot 33
Little Egg Harbor Township; Ocean County
Watershed: Forked River, Drainage
Basin: Atlantic
Waterway: Mill Branch

Dear Mr. Hikmat:

The Division of Coastal Resources acting under the provisions of the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A has decided not to grant an Individual Freshwater Wetlands Permit for the reasons set forth as follows:

The project does not meet the requirements of the Freshwater Wetlands Protection Act and the implementing Rules at N.J.A.C. 7:7A. Specifically the following:

1. All alternatives have not been reasonably exhausted after taking into consideration cost, existing technology, and logistics in light of the overall project purposes and environmental consequences.

2. The Department has determined that the wetlands on-site are documented habitat for threatened or endangered species and as a result are classified as exceptional resource value. The applicant has not demonstrated compliance with the provisions of N.J.A.C. 7:7A-3.3 for non-water dependent activities in freshwater wetlands of exceptional resource value.

3. The applicant has failed to demonstrate that an access road to undeveloped uplands is a public need and has not demonstrated that denial of the project would result in an extraordinary hardship.

In accordance with the Rules, specifically 7:7A-12.8, the applicant or other party aggrieved by this action may, within 30 days of this decision, request an administrative hearing by addressing a written request to Christopher J. Daggett, Commissioner, New Jersey Department of Environmental Protection, CN 401. Trenton, New Jersey 08625.

If you have any questions please contact Mr. William Dixon of my staff at (609) 984-0853.

Sincerely,

/s/ John R. Weingart
John R. Weingart,
Director

c: US Environmental Protection Agency, Region II
US Army Corps of Engineers, Philadelphia District
Ocean County Planning Board
Little Egg Harbor Planning Board
Little Egg Harbor Clerk
Darwin Griffith
Seymour Kagan
Richard Shackleton

[LOGO]

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON STREET
NEWARK NJ 07102
(201) 648-6006

Jaynee LaVecchia
Director

Seymour J. Kagan, Esq.
Berry, Kagan &
Sahradnik, Esqs.
P.O. Box 757
212 Hooper Avenue
Toms River, NJ 08754

Karen L. Hershey, DAG
Division of Law
Hughes Justice Complex
CN 112
Trenton, NJ 08625

INITIAL DECISION

RE: Tall Cedars
OAL DKT. NO.
ESA 9585-89
AGENCY DKT. NO. 89-347

Terry F. Brady, Esq.
Gilmore & Monahan, Esqs.
P.O. Box 1540
Toms River, NJ 08754

Dear Counsel:

The enclosed copy of the Administrative Law Judge's Initial Decision of the proceeding identified above is made available for your review before a final decision is rendered by the Department of Environmental Protection.

You may "file exceptions, objections, and replies thereto", with Nancy B. Stiles, Director, Division of Regulatory Services, Department of Environmental Protection, 401 East State Street, 7th Floor, West Wing, CN 402, Trenton, New Jersey 08625, *in writing*, within ten (10) calendar days from receipt of this Initial Decision.

Within five (5) days from receipt of exceptions, any party may file a reply with the agency head. Such replies may include cross exceptions or submissions in support of the Initial Decision.

A copy of any exceptions or replies should also be sent to this office and the other parties or their attorneys. For any exceptions please indicate on the face of the envelope and at the top of the first page the words **"ATTENTION: EXCEPTION FILE."**

If a written response is not received by the date specified, it will be assumed that you do not object and a final decision will be processed.

Very truly yours,

/s/ Jaynee LaVecchia
Jaynee LaVecchia
Director and Chief ALJ

DATE: AUG 8 1990

JL:am
Enc.
Certified Mail No.: P 152 094 899 (Kagan)
P 152 094 900 (Brady)

[LOGO]

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ESA 9585-89

AGENCY DKT. NO. 89-347

TALL CEDARS

Petitioner,

v.

DIVISION OF COASTAL RESOURCES, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

Seymour J. Kagan, Esq., for petitioner (Berry, Kagan and Sahradnik, attorneys)

Karen Lynn Hershey, Deputy Attorney General, for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: July 13, 1990 Decided: August 2, 1990

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter involves an appeal by the owner of "Tall Cedars" which is real property located at Block 78, Lot 33, Little Egg Harbor Township, New Jersey, from the determination of the Division of Coastal Resources denying an Individual Freshwater Wetlands Permit application for construction of an access road. Respondent notified petitioner of its determination by letter dated July 19, 1989.

By letter dated August 16, 1989, peitioner [sic] requested a hearing to appeal the determination and on December 19, 1989, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 *et seq.*

Early settlement efforts failed to resolve the matter and accordingly the matter was reassigned to the undersigned and scheduled for hearing on June 18, 1990. On the date of the hearing the parties appeared and placed certain stipulations on the record and agreed to file cross-motions for summary decision. A trial date was scheduled for July 30, 1990, in the event that the matter could not be resolved on motion. Petitioner's motion and supporting papers were received on July 5, 1990. Respondent's motion and supporting papers were received on July 6, 1990. A reply brief on behalf of respondent was received on July 12, 1990, and petitioner's reply to respondent's initial submission was received on July 13, 1990, whereupon the record closed.

Thereafter, a motion for permission to participate was filed by Terry F. Brady, Esq., on behalf of the Borough of Tuckerton. Having reviewed all of the papers submitted by the parties and the Borough of Tuckerton's motion for permission to participate, by letter dated July 23, 1990, and faxed to counsel for the parties and to Mr. Brady the same day, the undersigned advised that an initial decision granting summary decision in favor of respondent, Division of Coastal Resources, would be issued on or before August 27, 1990, and that, accordingly, the pending motion for permission to participate was moot and the hearing date scheduled for July 30, 1990, was adjourned.

FINDINGS OF FACT

The facts necessary to a determination of the within matter are not in dispute and I, therefore, **FIND** the following as uncontested facts.

Darwin R. Griffith is the sole owner of real property located at Block 78, Lot 33, Little Egg Harbor Township, Ocean County, New Jersey, formerly designated as part of Lot 6, Block 78, and more commonly referred to as "Tall Cedars." Mr. Griffith was awarded said property as a result of a partition action culminating in an Order of Dissolution, dated March 28, 1984, entered by the Superior Court of New Jersey, Chancery Division, Ocean County, New Jersey, Docket C-3738-83. Further, as a result of said Order, a deed was executed by Joseph A. Courter, Sr., and Darwin R. Griffith, a partnership, to Mr. Griffith for an access easement extending from Bridge Road over and across Lot 21A to Lot 33.

The above referenced property lies along the north side of Nugentown Road and consists of 63 acres, plus or minus, approximately 23 acres of which consist of wetlands. This property, which currently exists in its natural, undeveloped and vacant state has legal access to Nugentown Road, but that access requires a permit from the Bureau of Fresh Water Wetlands. Access to Bridge Road via the access easement across Lot 21A would also require a Freshwater Wetlands Permit.

On or about August 12, 1988, petitioner submitted to respondent an application for an Individual Freshwater Wetlands Permit and Water Quality Certificate for the purpose of constructing a roadway from Nugentown Road to the site in question which would require the

filling of approximately .46 acres of wetlands. The purpose of the proposed project as stated in the application is to obtain fair market value for the site.

Respondent's July 19, 1989, determination set forth the following reasons for denying the application: 1) all alternatives had not been reasonably exhausted after taking into consideration, costs, existing technology and logistics, including the fact that petitioner had failed to reveal the existence of the access easement running from Bridge Road to the subject property; 2) respondent determined that the wetlands petitioner proposed to fill were documented habitat for threatened and endangered species and therefore constituted exceptional resource value wetlands, and further, respondent determined that petitioner had failed to demonstrate compliance with the provisions of N.J.A.C. 7:7A-3.3 for nonwater-dependent activities in freshwater wetlands of exceptional resource value, i.e., petitioner had failed to demonstrate that an access road to undeveloped uplands constitutes a public need and that denial of the project would result in an extraordinary hardship.

After this matter was transmitted to the Office of Administrative Law for determination as a contested case, a settlement conference was conducted before the Honorable Bruce R. Campbell, ALJ, as the result of which a memorandum dated March 13, 1990, was prepared by respondent's counsel and provided to Judge Campbell and counsel for petitioner. This memorandum provided in pertinent part:

1. The Division will further investigate the title question as it relates to the easement granted by Courter & Griffith to Griffith

extending from Bridge Road to Lot 33. The Division will inform all parties in writing as to its position on the title impediment issue no later than March 23, 1990;

2. The Division and counsel for Tall Cedars will send concurrent letters to all adjacent property owners along Nugentown Road requesting an easement or buy-out that will provide Mr. Griffith with reasonable alternative road access to Lot 33. The Division and Tall Cedars shall work together in drafting a mutually agreeable form letter to be sent to these various land owners. These letters shall be mailed no later than March 23, 1990 and the landowners shall be given 10 days to respond;

3. If alternate access to Lot 33 cannot be accomplished as per number 1 or number 2 cited above, the parties will enter into a consent order which shall provide for the following:

   a) The issuance of an Individual Freshwater Wetlands Permit;

   b) A transition area waiver;

   c) A federal consistency letter;

   d) A mitigation plan;

   e) A statement attesting to the satisfaction of the Division's environmental concerns as it relates to a stream encroachment permit;

   f) A 401 water quality certification

   Said consent order shall be drafted and submitted to counsel for Tall Cedars no later

than May 15, 1990 and counsel for Tall Cedars shall review said order and respond no later than May 22, 1990.

The "title question" referred to in paragraph number 1 of Ms. Hershey's memorandum refers to a trapezoidal area of .638 acres of Lot 33, Block 78 which is adjacent to Lot 21A, Block 78. A title insurance policy issued by Lawyers' Title prior to Mr. Griffith's acquisition of the property excepted this area from coverage based upon a 1982 survey by Fellows, Read and Associates which reflected a series of overlapping deeds to the trapezoidal area. Subsequent to the issuance of that title insurance policy, Mr. Griffith instituted a partition action in the Superior Court of New Jersey, Chancery Division, against his then partners, Joseph Courter, Sr., and Roy Germanotta, which resulted in a judgment pursuant to which Mr. Griffith received a deed of conveyance from Joseph A. Courter, Sr., and Darwin R. Griffith, a partnership, dated June 27, 1984, for the subject property including the trapezoidal area. The June 27, 1984 deed also included the access easement from Bridge Road across Lot 21A to the trapezoidal area. The title policy which was issued to Mr. Griffith after the partition action also excluded from coverage the trapezoidal area because of the possible overlap of titles previously referred to.

Pursuant to the provisions of the March 13, 1990 memo, petitioner's counsel forwarded a letter to John and Betty Allen, the owners of unimproved property located at Block 78, Lot 25, on the Little Egg Harbor Tax Map, which property has a northerly boundary abutting Block 78, Lot 33, and a southerly boundary fronting on Nugentown Road. The letter indicated Mr. Griffith's willingness

to purchase the lot for its fair market value for the purpose of affording alternate means of accessing his property. By letter dated April 10, 1990, the Allens offered their two properties (Lots 25 and 29, Block 78) to Mr. Griffith as a package for $750,000 and indicated their lack of interest in selling Lot 25 separately. By letter dated April 12, 1990, to the Allens, petitioner indicated that Mr. Griffith would consider purchasing Lot 25 only for the sum of $85,360 based on a value of approximately $22,000 per acre for 3.8 acres. No response to this letter was received, however.

Thereafter letters were sent by petitioner and respondent to the owners of property located adjacent to Lot 33 for the purpose of inquiring as to said owners' willingness ~~the~~ to sell Mr. Griffith their unimproved property, a portion thereof or a right-of-way easement at fair market value or their willingness to purchase Mr. Griffith's property for its fair market value. No favorable responses to these letters were received.

By letter dated May 31, 1990, respondent advised petitioner that it has determined that petitioner failed to demonstrate that there exists "no practicable alternative" which would not involve a fresh water wetlands or would have a less adverse impact on the wetlands. Respondent confirmed its position that the Freshwater Wetlands statute and regulations require Mr. Griffith to initiate a law suit to quiet title to Block 78, Lot 33 as a practicable alternative to disturbing the subject wetlands. The letter further indicated that petitioner had not exhausted all practicable alternatives relative to its efforts to purchase adjacent property along Nugentown Road,

specifically referring to the apparent absence of a mutually agreed upon real estate appraiser to assess the fair market value of the Allens' property. As a result respondent indicated that it would not enter into a settlement agreement which would allow for the issuance of an individual Freshwater Wetlands Permit for Block 78, Lot 33.

On Monday, June 18, 1990, the scheduled date for a hearing in this matter, the parties agreed that cross motions for summary decision would be filed and they placed the following stipulations upon the record relevant to the motions:

> The parties agree that Mr. Griffith will offer $115,000 for property at Block 78, Lot 25. If a price within 5 percent of $115,000 is offered by the Allens, the State will consider acquisition of the Allen's property to be a practicable alternative means of access to Block 78, Lot 33. If no offer within 5 percent of the $115,000 is made by the Allens, the State will consider the acquisition of the Allen's (sic) property not to be practicable alternatives.
>
> Those communications will be in writing, will allow five working days for response by the Allens, and copies of all correspondence with the Allens will be provided to the State.
>
> The State stipulates that Mr. Griffith is only required to offer to purchase the unimproved lot, Lot 25, and not Lot 29 which contains the Allens' (sic) home.
>
> With regard to the title problem, there is an access easement running from Bridge Road through block 78, Lot 21A towards Mr. Griffith's

> property. There is some question as to whether Mr. Griffith holds title to a trapezoidal area which is required in order to utilize the easement. Lawyer's Title Company has declined to insure the trapezoidal area.
>
> There are no other factual issues in this dispute, other than the legal issue as to whether under case law, statutes, regulations and the above stipulated facts, whether the applicant has a duty to initiate a Quiet Title action as a condition precedent to a granting of the Freshwater Wetlands Permit granted (sic) in the subject application.

Thereafter, petitioner sent the required letter to the Allens, certified mail, return receipt requested. The letter was received by them on June 22, 1990. Petitioner has received no response to the letter.

For purposes of this motion, petitioner also asserts that at the time of transfer of title on June 27, 1984, from Courter and Griffith, a partnership, to Griffith, in fact Courter and Griffith did not have title to Lot 21A, the property subject to the access easement. Petitioner alleges that said property was in fact owned by Jomad Realty Corporation, title having been acquired by deed dated August 8, 1983, in Book 4140, pages 180-181 from Roy Germanotta, Inc. No original documents are provided in connection with this assertion. The assertion simply appears in paragraph number 5 of the affidavit of Chester Martowles, a Title Examiner for Lawyers Title Insurance Corp. For purposes of determining this motion the representations concerning title to Lot 21A will be accepted as

true. It is also noted from documents provided in connection with this motion that the principal of Jomad Realty appears to be Joseph Courter, Sr.

APPLICABLE LAW AND DISCUSSION

Pursuant to N.J.S.A. 13:9B-9, respondent may issue a freshwater wetlands permit only if it finds, inter alia, that the reported activity is "nonwater dependent and has no practicable alternative" as demonstated [sic] by N.J.S.A. 13:9B-10 "which would not involve a freshwater wetland or which would have a less adverse impact on the aquatic ecosystem. . . . "

N.J.S.A. 13:9B-10 provides in pertinent part:

> a. It shall be a rebuttable presumption that there is a practicable alternative to any non-water – dependent regulated activity that does not involve a freshwater wetland, and that such an alternative to any regulated activity would have less of an impact on the aquatic ecosystem. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes, and may include an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity.
>
> b. In order to rebut the presumption established in subsection a. of this section an applicant for a freshwater wetlands permit must demonstrate the following:

> (1) That the basic project purpose cannot reasonably be accomplished utilizing one or more other sites in the general region that would avoid, or result in less, adverse impact on an aquatic ecosystem; and . . .

See also N.J.A.C. 7:7A-3.2 which repeats the statutory criteria and N.J.A.C. 7:7A-1.4 which defines "practicable alternative" as "other choices available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes, and may require an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfull the basic purpose of the proposed activity." The purpose of the project stated in the application is to construct a roadway through wetlands to Block 78, Lot 33, so that Mr. Griffith can obtain fair market value for the property at the time of sale. He has no current plans to develop the uplands portion of the property himself. It is the position of respondent that prior to permitting petitioner to disturb the valuable wetlands off of Nugentown Road which have been classified as exceptional resource value wetlands based upon respondent's determination that they are the habitat of the Pine Barrens Tree Frog and which also contain valuable old growth White Cedar, petitioner should be required to institute litigation to resolve the title problems related to access from Bridge Road through Lot 21A. It is petitioner's position that litigation to quiet title to the trapezoidal area and to prove entitlement to the access easement across Lot 21A is not a practicable alternative to obtaining access to the property because of the opinion of Chester Martowlis, a

title examiner with Lawyers Title Insurance Corporation, that the litigation probably would be unsuccessful. It was also Mr. Martowlis's opinion that locating hundreds of potential parties in interest and serving them under the law would be exceptionally difficult and expensive, possibly exceeding $100,000.

Incredibly, petitioner also argues that it lacks standing to institute a quiet title action with regard to the property located at Block 78, Lot 33 because he does not satisfy the statutory requirement that the plaintiff be a "person claiming ownership." N.J.S.A. 2A:62-1 et seq. To say that Mr. Griffith is not a "person claiming ownership" because he has an adverse opinion from a title insurance company is just plain silly. It is obvious on the face of the documents supplied in connection with these motions that Mr. Griffith holds a deed to the property and easement in question herein, and he either was or should have been aware at the time of the litigation against his former partners. Joseph Courter, Sr. and Roy Germanotta, of the deeds, survey work, and opinions of Lawyers' Title Insurance Corporation, which he now attempts to rely upon to require respondent to grant a Freshwater Wetlands Permit to disturb the wetlands off of Nugentown Road. Mr. Griffith has a deed which he obtained as a result of the 1984 court ordered partition granting him the property in question and access to the property by the easement in question. It is clearly not for this forum not to determine whether the title which the Superior Court required Mr. Griffith's partners to give him is good title. The apparent purpose of the deed and easement required to be conveyed to Mr. Griffith in the partition action was to give the property access to Bridge Road. Although it is

undisputed that an access road built to Tall Cedars from Bridge Road would also require a Freshwater Wetlands Permit it likewise appears to be undisputed that this route would have "less of an impact on the aquatic ecosystem."

What petitioner is asking this forum to do herein is to assess his likelihood of success on the merits in a suit in Superior Court to resolve the title problems. Stated another way, petitioner is saying that respondent's requirement that Mr. Griffith attempt through the courts to clear title to the access easement and property he obtained in the court ordered judgment of 1984 is arbitrary, capricious and unreasonable. Petitioner also notes that the cost of ligitagion [sic] could be expensive. Under all of the circumstances herein, I CONCLUDE that petitioner's position is wholly without merit. Cost is only one factor to be assessed; in the present matter given that the problems to be resolved have their origin in previous litigation instituted by Mr. Griffith, the cost of additional litigation to resolve the problems is not a significant consideration when compared with the State's legislated policy "to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." N.J.S.A. 13:9B-2. I CONCLUDE that under the circumstances it is not unreasonable to require Mr. Griffith to attempt to resolve his title problems with his former partners and the corporations in which they are principals. I make no determination concerning the likelihood of success on the merits of such a suit; this forum is without jurisdiction to address the merits of such an action, and as respondent has pointed out in its papers, the ultimate conclusion of such a suit is

irrelevant to a determination of the within matter. If petitioner prevails, then the access necessary to permit the property to command fair market value upon sale has been established.* If the Superior Court action results in a judgment against petitioner, respondent would be satisfied that petitioner has pursued all practicable alternatives pursuant to the regulations.

Petitioner's allegation that respondent's refusal to grant an Individual Freshwater Wetlands Permit prior to commencement of the quiet title action constitutes the taking of petitioner's property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution is likewise an allegation which must be pursued in a court of competent jurisdiction; this forum has no jurisdiction to determine such constitutional issues.

For the foregoing reasons, I CONCLUDE that petitioner is required to resort to a court of competent jurisdiction to attempt to establish his right to access the property known as Tall Cedars from Bridge Road through the deed he obtained as a result of the court ordered partition in 1984.

BOROUGH OF TUCKERTON'S APPLICATION TO PARTICIPATE

On July 20, 1990, the Borough of Tuckerton filed and served a motion for permission to participate pursuant to

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* Respondent's position herein is interpreted as meaning that an application for a Freshwater Wetlands Permit in connection with the Bridge Road access would be granted.

N.J.A.C. 1:1-16.6. A letter memorandum in opposition to the motion was received from petitioner on August 1, 1990. The motion papers expressed the Borough's interest in participating to oppose issuance of a permit which would encroach upon the Mill Branch Tributary and which might have an adverse impact upon Tuckerton Lake and the Borough of Tuckerton. The only issue for determination in this case was whether petitioner is required to attempt via litigation in the courts to establish legal access from Bridge Road through Lot 21A, and that issue has been resolved in respondent's favor. Accordingly, the present case will not result in the issuance of the permit the borough wished to oppose, and therefore, the Borough's motion is denied as moot.

For all of the foregoing reasons, it is hereby **ORDERED** that petitioner's motion for summary decision is hereby **DENIED**; the Borough of Tuckerton's motion to participate is hereby **DENIED**; and respondent's motion for summary decision is hereby **GRANTED** and the within matter is **DISMISSED WITHOUT PREJUDICE** to petitioner's rights to reapply should the Superior Court litigation required by this opinion be unsuccessful.

This recommended decision may be adopted, modified or rejected by **JUDITH A. YASKIN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,** who by law is empowered to make a final decision in this matter. However, if Judith A. Yaskin does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **JUDITH A. YASKIN** for consideration.

August 2, 1990 /s/ M. Kathleen Duncan
DATE M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8-6-90 /s/ Shelia Harrison
DATE DEPARTMENT OF ENVIRONMENTAL PROTECTION

Mailed To Parties:

AUG 8 1990 /s/ Jaynee LaVecchia
DATE OFFICE OF ADMINISTRATIVE LAW

am

Let's protect our earth
[LOGO]

STATE OF NEW JERSEY
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION
JUDITH A. YASKIN,
COMMISSIONER
CN 402
TRENTON, N.J. 08625-0402
(609) 292-2885
Fax: (609) 984-3962

FINAL DECISION
OAL DKT. NO. ESA 9585-89
AGENCY DKT. NO. 89-347

DARWIN R. GRIFFITH,

Petitioner,

v.

DIVISION OF COASTAL
RESOURCES, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

Having reviewed the entire file in this matter transferred from the Office of Administrative Law ("OAL") pursuant to N.J.A.C. 1:1-18, including the Initial Decision issued August 2, 1990[1], and exceptions filed by the parties, I hereby REJECT the Initial Decision of the Administrative Law Judge ("ALJ"), and REMAND the matter to OAL.

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[1] The Initial Decision states that the petitioner is "Tall Cedars." As the referral of this matter to OAL states, the petitioner is Darwin R. Griffith; "Tall Cedars" is the common name for petitioner's property.

Background

Petitioner Darwin R. Griffith ("Griffith") owns a 63-acre parcel of undeveloped real property commonly known as "Tall Cedars". Tall Cedars is located on Nugentown Road in Little Egg Harbor Township, Ocean County. Griffith became the owner of Tall Cedars under an Order of Dissolution issued in March, 1984 by the Superior Court of New Jersey, Chancery Division, Ocean County, dissolving a partnership (the "Partnership") between Griffith and Joseph A. Courter, Sr. ("Courter"). In the deed conveying Tall Cedars to Griffith, the Partnership also granted Griffith an easement to provide Tall Cedars with access to Bridge Road.

Title to .638-acre portion of Tall Cedars (the "Disputed Parcel")[2] is in dispute. The easement from Bridge Road, across the property previously owned by the Partnership but not conveyed to Griffith (the "Courter Property"), ends at the Disputed Parcel. The Disputed Parcel covers the entire boundary between Tall Cedars and the Courter Property.

Accordingly, if Griffith does not own the Disputed Parcel, the easement across the Courter Property does not reach the remainder of Tall Cedars and does not provide Tall Cedars with access to Bridge Road. Griffith would

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[2] The Disputed Parcel is designated on the Survey Map prepared by Joseph R. Read, P.E., L.S., dated April 23, 1982, as the trapezoidal parcel bounded by monuments 28-1, 28, 29 and 29-1. The deed from the Partnership to Griffith purported to convey the Disputed Parcel to Griffith. *See* courses 2, 3 and 4 of the metes and bounds description of "Parcel 3" recorded at Deed Book 4217, Page 142.

need either to obtain another means of access to Bridge Road, or to obtain access to Nugentown Road.

In August, 1988, Griffith applied to respondent, Division of Coastal Resources ("DCR"), for a freshwater wetlands permit to allow construction of an access road linking Tall Cedars to Nugentown Road. According to Griffith's application, construction of the proposed access road requires approximately 2,000 cubic yards of fill material to be deposited into .46 acres of wetlands, with the total area of wetlands disturbance limited to .47 acres.

In July, 1989, DCR denied Griffith's permit application. In its denial letter, DCR noted that the access road project failed to meet the requirements of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 *et seq.* (the "Act"), and the rules implementing the Act, N.J.A.C. 7:7A, for the following reasons:

1. All alternatives have not been reasonably exhausted after taking into consideration cost, existing technology, and logistics in light of the overall project purposes and environmental consequences.

2. The Department has determined that the wetlands on-site are documented habitat for threatened or endangered species and as a result are classified as exceptional resource value. The applicant has not demonstrated compliance with the provisions of N.J.A.C. 7:7A-3.3 for non-water dependent activities in freshwater wetlands of exceptional resource value.

3. The applicant has failed to demonstrate that an access road to undeveloped uplands is a public need and has not demonstrated that denial of the

project would result in an extraordinary hardship.

DCR determined that Griffith had failed to exhaust his alternatives in part because he apparently did not explore using the Bridge Road easement granted by the Partnership to Griffith. DCR further noted that Griffith had not informed DCR of the existence of the easement during the course of the permit review.

In December, 1989, DEP transmitted the permit denial to OAL as a contested case. In the OAL proceeding, DCR and Griffith filed cross motions for summary decision. As a result of stipulations which the parties placed upon the record, the sole dispute concerning alternatives to the proposed Nugentown Road access was whether Griffith had a duty to initiate an action to quiet title to the Disputed Parcel. Apparently, the parties agreed that Griffith's efforts to purchase other property providing access to Nugentown Road or Bridge Road, or obtain a right-of-way providing access, sufficiently exhausted those alternatives.

On the motions for summary decision, the ALJ issued an Initial Decision upholding the denial of the permit. The ALJ concluded that Griffith had failed to exhaust his alternatives to the Nugentown Road access road, by failing to commence the quiet title action. The Initial Decision contained no conclusion regarding the classification of the wetlands in question as "exceptional resource value," or regarding the issues of public need and extraordinary hardship.

Analysis

Existence of practicable alternatives

N.J.S.A. 13:9B-9 and N.J.A.C. 7:7A-3.2(a) prohibit DEP from issuing a freshwater wetlands permit for a nonwater-dependent activity unless it finds that there is no practicable alternative to the activity, which alternative meets certain requirements. N.J.S.A. 13:9B-10(a) and N.J.A.C. 7:7A-3.2(c) provide for a rebuttable presumption that a practicable alternative exists which satisfies those requirements.

The statute and rule further state that an alternative is practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes. N.J.S.A. 13:9B-10(a); N.J.A.C. 7:7A-3.2(c)1. To rebut the presumption, an applicant must demonstrate that the basic project purpose cannot reasonably be accomplished utilizing one or more other sites in the general region that would avoid or reduce the adverse impact on an aquatic ecosystem. N.J.S.A. 13:9B-10(b); N.J.A.C. 7:7A-3.2(d)1.

The ALJ concluded that it was undisputed that the Bridge Road access would have less of an impact upon the aquatic ecosystem than construction of the Nugentown Road access. However, Griffith has disputed this conclusion in his exceptions to the Initial Decision.

The ALJ also concluded that to rebut the presumption that a practicable alternative exists, Griffith must resort to a court of competent jurisdiction to establish his right to access to Bridge Road across the Disputed Parcel. While the ALJ conceded that an action to establish this

right by quieting title to the Disputed Parcel could be expensive, she noted that cost is only one factor to be assessed in determining whether an alternative is practicable.

No New Jersey case law addresses the issue of what is a "practicable" alternative under the Freshwater Wetlands Protection Act. However, federal case law interprets similar language in the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4332(2)(C).

NEPA requires all agencies of the Federal government to prepare a report on proposals for legislation and other major Federal actions significantly affecting the quality of the environment. That report must include a detailed statement of alternatives to the proposed action. 42 U.S.C. 4332(2)(C)(iii).

Though NEPA does not limit the requirement for a statement of alternatives to "practicable" alternatives, the federal courts nonetheless have imposed a rule of reason upon the requirement. *Granzig Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1074 (5th Cir. 1980). The statement need not include "every alternative device and thought conceivable by the mind of man." *Maryland Wildlife Federation v. Dole*, 747 F.2d 229 (4th Cir. 1984). The courts cannot require consideration of alternatives which are "remote and speculative." *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 294 (D.C.Cir. 1988). Nor can they require consideration of alternatives which are "too fanciful or hypothetical." *Granzig*, 626 F.2d at 1074.

Accordingly, I CONCLUDE that the Freshwater Wetlands Protection Act requirement for resort to practicable alternatives is subject to a similar rule of reason, and does

not require an applicant to pursue alternatives which are remote and speculative, or too fanciful or hypothetical.

The action to quiet title which OAL would require Griffith to pursue must be evaluated by this standard. While OAL cannot be required, in effect, to try the quiet title action, the ALJ certainly can hear evidence concerning the likelihood of Griffith's success in such an action, and determine whether that likelihood is too slim to be practicable.

I note that the record from OAL contains a title insurance policy excepting the Disputed Parcel from coverage. The ALJ should evaluate whether the exception in the title policy means that Griffith is unlikely to prevail in the quiet title action, or whether it means only that Griffith's title to the Disputed Parcel may be subject to challenge. The record also contains an affidavit of a title examiner employed by the issuer of the title policy, concerning the expense and likelihood of success of the quiet title action; the persuasiveness of this affidavit depends at least in part upon the qualifications of the title examiner to reach these conclusions.

Griffith argues that the quiet title action is not practicable because he lacks standing to institute the action. Only a "person claiming ownership" of the property which is the subject of such an action has standing to institue [sic] the action. N.J.S.A. 2A:62-1 *et seq.* Griffith asserts that he is not a "person claiming ownership" of the Disputed Parcel, based upon his survey and title insurance policy.

The ALJ correctly described this argument as "just plain silly." Initial Decision, at 8. The quiet title statute

requires only that the claim of ownership must be based upon a deed "wherein the grantor does have something to convey or honestly believes he does." *Hyland v. Kirkman*, 204 N.J. Super 345, 370 (Ch. Div. 1985). Neither the Initial Decision nor Griffith's exceptions indicate that this requirement was considered in OAL. The ALJ should consider this requirement in evaluating whether Griffith's chances of establishing standing are "remote and speculative."

The Initial Decision contained no findings concerning the potential cost of the quiet title action. The ALJ noted that the cost of the quiet title action is "only one factor to be assessed," and "not a significant consideration" in this case. Initial Decision, at 9. However, at least one case held that consideration of a particular alternative was unnecessary solely because it was prohibitively expensive. *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986). Accordingly, I CONCLUDE that the cost of an alternative alone can be sufficient to support a determination that an alternative is impracticable.

Exceptional Resource Value Wetlands

In denying Griffith's permit application for the Nugentown Road access, DCR determined that the wetlands in question are documented habitat for threatened or endangered species, and therefore classified the wetlands as exceptional resource value. Specifically, DCR relied upon records showing that Pine Barrens treefrogs were present on parcels immediately downstream and just upstream from Tall Cedars.

Since the ALJ concluded that a practicable alternative to the Nugentown Road project existed, the Initial Decision did not address the validity of DCR's classification of the wetlands. Griffith has noted his exception to the classification, based upon the Initial Decision in *Baruffie & Hall Development Co. v. Division of Coastal Resources, Bureau of Freshwater Wetlands*, OAL Docket No. ESA 5318-89, Agency Docket No. 89-161. While I affirmed the *Baruffie & Hall* Initial Decision in a Final Decision dated September 14, 1990, I must note that the Final Decision specifically refrained from affirming, rejecting or modifying the aspect of the *Baruffie & Hall* Initial Decision cited by Griffith.

Conclusion

For the reasons discussed above, I REJECT the Initial Decision, and REMAND the matter to OAL for further proceedings in accordance with this Final Decision as described below.

1. *Likelihood of success in quiet title action.* The ALJ should evaluate the likelihood that Griffith will have standing to institute the quiet title action concerning the Disputed Parcel, and the likelihood that he will prevail in the action. If the likelihood is remote and speculative, then quieting title to the Disputed Parcel cannot be a practicable alternative to Griffith's proposed project.

Since the Initial Decision did not address the likelihood that the quiet title action would succeed, the ALJ did not evaluate the evidence which Griffith submitted concerning that likelihood. This evidence primarily consisted of an affidavit of a title examiner employed by the

title insurance company which issued Griffith's title policy, and the title policy itself, which contained an exception concerning the Disputed Parcel. The ALJ should determine whether the exception in the title policy means that the title insurance company believes that fee title to the Disputed Parcel is vested in someone other than Griffith, or if it means only that the title insurance company believes that title to the Disputed Parcel is sufficiently open to question to make it uninsurable. The ALJ should also evaluate the qualification of the title examiner to render an opinion concerning the predicted success of the quiet title action.

2. *Cost of quiet title action.* If the ALJ determines that Griffith's chances of success in the quiet title action are more than remote and speculative, the ALJ then should evaluate the expected cost of the action. Cost alone may be sufficiently prohibitive to make the quiet title action impracticable.

3. *Impact upon aquatic ecosystem.* As noted above, Griffith has disputed the ALJ's conclusion that the Bridge Road access would have less of an impact upon the aquatic ecosystem than construction of the Nugentown Road access. The ALJ should address this dispute on remand.

4. *Exceptional resource value classification.* If the ALJ determines that there is no practicable alternative to the Nugentown Road access, she need not address DCR's classification of the wetlands as exceptional resource value. If the ALJ addresses the issue and upholds DCR's determination, the Nugentown Road access project must

be evaluated in light of the standards set forth in N.J.A.C. 7:7A-3.3.

5. *Borough of Tuckerton's application to participate.* On July 20, 1990, the Borough of Tuckerton filed a motion for permission to participate under N.J.A.C. 1:1-16.6. The ALJ denied the Borough's motion, because the Initial Decision upholding DCR's permit denial made the motion moot. I hereby ORDER that the Borough's motion be reinstated, and decided by the ALJ on remand.

DATE: November 5, 1990 /s/ Judith A. Yaskin
JUDITH A. YASKIN
Commissioner

[LOGO]

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
CN 049
QUAKERBRIDGE PLAZA, BLDG #9
TRENTON, NEW JERSEY 08625
(609) 588-3584

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on AUG 12 1991.

[LOGO]
State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ESA 910-91
(ESA 9585-89 ON REMAND)
AGENCY DKT. NO. 91-0039

DARWIN R. GRIFFITH,

Petitioner,

v.

DIVISION OF COASTAL RESOURCES, NEW JERSEY DEPARTMENT OF ENVIRONENTAL [SIC] PROTECTION,

Respondent.

Seymour J. Kagan, Esq., for petitioner (Berry, Kagan & Sahradnik, attorney)

Karen L. Hershey, Deputy Attorney General, for respodent [sic] (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record: June 28, 1991 Decided: August 5, 1991

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter arises out of the November 5, 1990 Final Decision of the Commissioner of the Department of Environmental Protection in *Darwin R. Griffith v. Division of Costal* [sic] *Resources*, ESA 9585-89. The file on remand was transmitted to the Office of Administrative Law on January 25, 1991, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The issues for determination on remand were specifically identified by the Commissioner as follows:

> For the reasons discussed above, I **REJECT** the Initial Decision and **REMAND** the matter to the OAL for further proceedings in accordance with this Fiinal [sic] Decision as described below.
>
> 1. *Likelihood of success in quiet title action.* The ALJ should evaluate the likelihood that Griffith will have standing to institute the quiet title action concerning the Disputed Parcel, and the likelihood that he will prevail in the action. If the likelihood is remote and speculative, then quieting title to the Disputed Parcel cannot be a practicable alternative to Griffith's proposed project.
>
> Since the Initial Decision did not address the likelihood that the quiet title action would succeed, the ALJ did not evaluate the evidence

which Griffith submitted concerning that likelihood. This evidence primarily consisted of an affidavit of a title examiner employed by the title insurance complany [sic] which issued Griffith's title policy, and the title policy itself, which contained an exception concerning the Disputed Parcel. The ALJ should determine whether the exception in the title policy means that the title insurance company believes that fee title to the Disputed Parcel is vested in someone other than Griffith, or if it means only that the title insurance company believes that title to the Disputed Parcel is sufficiently open to question to make it uninsurable. The ALJ should also evaluate the qualification of the title examiner to render an opinion concerning the predicted success of the quiet title action.

2. *Cost of quiet title action.* If the ALJ determines that Griffith's chances of success in the quiet title action are more than remote and speculative, the ALJ then should evaluate the expected cost of the action. Cost alone may be sufficiently prohibitive to make the quiet title action impracticable.

3. *Impact upon aquatic ecosystem.* As noted above, Griffith has disputed the ALJ's conclusion that the Bridge Road access would have less of an impact upon the aquatic ecosystem than construction of the Nugentown Road access. The ALJ should address this dispute on remand.

4. *Exceptional resource value classification.* If the ALJ determines that there is no practicable alternative to the Nugentown Road access, she need not address DCR's classification of the wetlands as exceptional resource value. If the ALJ

addresses the issue and upholds DCR's determination, the Nugentown Road access project must be evaluated in light of the standards set forth in N.J.A.C. 7:7A-3.3

5. *Borough of Tuckerton's application to participate.* On July 20, 1990, the Borough of Tuckerton filed a motion for permission to participate under N.J.A.C. 1:1-16.6. The ALJ denied the Borough's motion, because the Initial Decision upholding DCR's permit denial made the motion moot. I hereby **ORDER** that the Borough's motion be reinstated, and decided by the ALJ on remand.

The Borough of Tuckerton's motion for permission to participate was heard and decided on January 30, 1991, and an Order permitting participation, issued on February 11, 1991, incorporated the ruling. A copy of that Order is attached hereto and made a part hereof as if set forth at length.

A prehearing conference also was conducted on January 30, 1991, at which time the issues to be determined at hearing were articulated as follows:

1. Would petitioner have standing to institute a quiet title action concerning the trapezoidal area in question and if so, would petitioner be likely to prevail in such an action?

2. If petitioner's chances of success in the quiet title action are more than remote and speculative, would the cost of said action be sufficiently prohibitive and/or would the delay to the Superior Court calendar be substantial enough to make the quite title action impracticable?

3. Would the Bridge Ridge access have less of an impact upon the aquatic ecosystem than construction of the Nugentown Road access?

4. If it is determined that there exists a practicable alternative to the Nugentown Road access, did the Division of Coastal Resources err in determining that the wetlands in question should be calssified [sic] as exceptional resource value?

5. If the answer to the previous questions is no, does the Nugentown Road access project meet the standards set forth in N.J.A.C. 7:7A-3.3?

The hearing was scheduled for April 15, 16, 17, 18 and 19, 1991, at the Trenton office of the Office of Administrative Law. Prior to the scheduled hearing dates counsel for respondent advised that the Department of Environmental Protection had decided to accept petitioner's contention that Nugentown Road was the only practicable access to the subject property. Although the parties have circulated a number of draft settlement agreements since that time, they have been unable to agree upon concluding language. During telephone conference calls the undersigned attempted to assist the parties in resolving their remaining differences; specifically noted, however, was the fact that a number of the items in dispute were beyond the jurisdiction of the Office of Administrative in the case as remanded by the Commissioner.

By letter dated June 10, 1991, counsel for petitioner wrote to the undersigned requesting a decision concerning the appropriate width of the roadway which will now provide access to Nugentown Road. Petitioner argues,

inter alia that respondent should be estopped from requiring a cartway of less than 26 feet because of a prior commitment in a letter of March 22, 1988. By letter dated June 14, 1991, the undersigned advised respondent's attorney of her intention to consider petitioner's June 10, 1991 letter as a motion for summary decision and requested responding papers by June 28, 1991. Respondent's reply, dated June 25, 1991, was received on June 26, 1991. A reply from petitioner was received June 28, 1991.

It is respondent's position that the Freshwater Wetlands permit conditions, specifically the width of the cartway, and the question concerning the issuance of a stream encroachment permit, are issues outside the current jurisdiction of the Office of Administrative Law, since they were not within the issues set forth by the Commissioner and transmitted to OAL on January 25, 1991. I am compelled to agree with respondent's position. Each of the issues transmitted to the Office of Administrative Law as articulated in the November 5, 1990 Final Decision of Commissioner Yaskin and as articulated in the Prehearing Order issued herein on January 30, 1991, has been resolved by respondent's stiplation [sic] that the Nugentown Road access is the only practicable alternative. The issues which are currently in dispute between the parties may at some time in the future be determined by the agency head as appropriate for determination as a contested case; should that happen, when the matter is transmitted to the Office of Administrative Law for determination, an administrative law judge will be assigned to that case to make recommended findings of fact and conclusions of law. The issues in the within case having

been resolved, however, it is hereby **ORDERED** that the within matter is **DISMISSED AS MOOT.**

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 7th Floor, West Wing, CN 402, Trenton, New Jersey 08625-0402,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 5, 1991
DATE

/s/ M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/7/91 /s/ Theresa Girstevacker
DATE DEPARTMENT OF ENVIRONMENTAL PROTECTION
Mailed To Parties:

Aug. 12, 1991 /s/ Jaynee LeVecckia
DATE OFFICE OF ADMINISTRATIVE LAW

am

[LOGO]
State of New Jersey
Department of Environmental Protection and Energy
CN 402
Trenton, NJ 08625-0402

Scott A. Weiner
Commissioner

FINAL DECISION
OAL DOCKET NO. ESA 910-91
(ESA 9585-89 ON REMAND)
AGENCY DOCKET NO. 91-0039

Darwin R. Griffith, Petitioner,
v. Division of Coastal Resources,
New Jersey Department of Environmental
Protection, Respondent

By letter dated July 19, 1989, the Department of Environmental Protection and Energy (Department) denied Darwin R. Griffith's application for an Individual Freshwater Wetlands Permit to construct an access road linking Tall Cedars, a parcel of undeveloped real property, to Nugentown Road, in Little Egg Harbor Township, Ocean County, New Jersey. The Department determined that Mr. Griffith's application did not meet the requirements of the Freshwater Wetlands Act and implementing rules under N.J.A.C. 7:7A *et seq.*

By letter dated August 16, 1989, Mr. Griffith requested an administrative hearing. On December 19, 1989, the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case and was assigned to Administrative Law Judge (ALJ) Kathleen Duncan. The parties executed a stipulation which provided, *inter alia*, that the only disputed factual

issue was whether "under case law, statutes, regulations and the . . . stipulated facts, . . . (Mr. Griffith) has a duty to initiate a Quiet Title action as a condition precedent to a granting of the Freshwater Wetlands Permit granted . . . in the subject application." (August 6, 1990 Initial Decision, page 6)

On August 6, 1990, ALJ Duncan issued an Initial Decision and concluded, *inter alia*, that: Mr. Griffith is required to resort to a court of competent jurisdiction to attempt to establish his right to access the Tall Cedars property and that under the circumstances, it is not unreasonable to require Mr. Griffith to attempt to resolve his title problems with his former partners and the corporations in which they are principals. (August 6, 1990 Initial Decision, page 9)

By Final Decision dated November 5, 1990, the Commissioner of the Department rejected ALJ Duncan's August 6, 1990 Initial Decision and remanded the matter to the OAL to determine: 1) Mr. Griffith's likelihood of success in a quiet title action; 2) the cost of a quiet title action; 3) the impact of the proposed construction upon the aquatic ecosystem; 4) whether the property was appropriately given an exceptional resource value classification; and 5) the Borough of Tuckerton's application to participate. (November 5, 1990 Final Decision, pages 6-7)

On August 7, 1991, ALJ Duncan issued an Initial Decision on Remand and dismissed the matter as moot. (August 7, 1991 Initial Decision, page 4) She noted that all of the issues set out in the Department's November 5, 1990 Final Decision and remanded to the OAL for determination had been resolved by the parties' stipulation

that the Nugentown Road access is the only practicable alternative. (August 7, 1991 Initial Decision, page 4) ALJ Duncan also concluded that the OAL had no jurisdiction to determine the Freshwater Wetlands permit conditions, specifically the width of the cartway and the question concerning the issuance of a stream encroachment permit, since these issues were not set forth in the Department's January 25, 1991 remand. (August 7, 1991 Initial Decision, page 4) These issues had arisen in the course of settlement discussions between the parties.

Due to the extensive history of this matter, I had previously sought a forty-five day extension of time to render a Final Decision to allow the parties a period of no more than thirty days to attempt settlement, failing which, I noted that I would issue a Final Decision determining whether this matter should be remanded to the OAL for further proceedings. The parties were unable to arrive at a settlement.

Initially, I note that the primary purpose of the remand of this matter was to determine the appropriateness of the Department's denial of the submitted application on the basis of the possible existence of alternatives that would have a lesser environmental impact. The purpose of the remand was not to determine potential conditions for any permit which might be granted as a result of the analysis.

The Freshwater Wetlands Protection Act gives the Department the exclusive authority to issue permits and impose conditions necessary for compliance with the Act. N.J.S.A. 13:9B-5(c). While the settlement process included an attempt to agree to the terms of a potential permit, the

failure of such settlement efforts does not give the ALJ power to rule on permit conditions which have not yet been set by the Department. Clearly the conditions applicable to a permit to be potentially issued as a result of this hearing were not at issue in this case and were not within the jurisdiction of the ALJ to decide. I therefore adopt the ALJ's ruling.

I have determined, however, that a limited remand is necessary to address an issue not clearly articulated in the Commissioner's previous order of November 5, 1990. In addition to provisions applicable to all freshwater wetlands permits, pursuant to N.J.A.C. 7:7A-3.3 certain additional showings must be made to conduct a non-water dependent activity, such as the access road here, in a wetlands classified as having exceptional resource value. Since the wetlands at issue are currently classified as exceptional resource value wetlands, the application must satisfy the standards of N.J.A.C. 7:7A-3.3. The issues of whether the classification of the wetlands is appropriate and, if it was, whether the criteria of N.J.A.C. 7:7A-3.3 were satisfied, were not addressed by ALJ Duncan's August 7, 1991 Initial Decision. This issue cannot be decided on the record before me; no hearings were conducted and a factual record was not developed to decide this issue. This matter will therefore be remanded to determine if a denial on this basis was warranted.

Having reviewed the record transmitted by the OAL pursuant to N.J.A.C. 1:1-18.1, I **HEREBY REMAND** this matter to the Office of Administrative Law for hearing regarding the following issue: (1) whether the project site is appropriately classified as exceptional resource value

wetlands and (2) if it is, whether the application satisfied the criteria of N.J.A.C. 7:7A-3.3.

Date: December 20, 1991 /s/ Scott A. Weiner
Scott A. Weiner,
Commissioner
Department of
Environmental
Protection and Energy

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
APPROVING SETTLEMENT
OAL DKT. NO. ESA 204-92
(ESA 910-91 on Remand)
AGENCY DKT. NO. 91-0039

DARWIN R. GRIFFITH,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY,
DIVISION OF COASTAL RESOURCES,

Respondent.

Seymour J. Kagan, Esq. for petitioner (Berry, Kagan & Sahradnik, attorneys)

Karen Lynn Hershey, Deputy Attorney General, for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: March 16, 1992 Decided: March 16, 1992

BEFORE **M. KATHLEEN DUNCAN, ALJ:**

This matter was transmitted to the Office of Administrative Law on January 8, 1992, for a hearing pursuant to N.J.S.A. 52:14B-1 *et seq.* and N.J.S.A. 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

Since the agency head has consented to the settlement terms, this decision is deemed the final decision. N.J.A.C. 1:1-19.1(b)2.

March 16, 1992 /s/ M. Kathleen Duncan
DATE M. KATHLEEN DUNCAN, ALJ

CONSENT ORDER
OAL DKT. NO. ESA 204-92
(ESA 910-91 on Remand)
AGENCY DKT. NO. 91-0039

DARWIN R. GRIFFITH,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, DIVISION OF COASTAL RESOURCES,

Respondent.

This matter having come before M. Kathleen Duncan, A.L.J., by way of a Final Decision of the Commissioner of the Department of Environmental Protection and Energy in the form of an Order of Remand dated December 20, 1991; with Karen Lynn Hershey, Deputy Attorney General, appearing on behalf of the New Jersey Department of Environmental Protection and Energy, Division of Coastal Resources, and Seymour J. Kagan, Esq., appearing on behalf of Darwin R. Griffith, petitioner; and

It appearing that the Department has determined that the land described in the attached March ___, 1992 memorandum from Larry Torok, Principal Planner, (hereinafter "Exhibit A") does not represent a suitable documented habitat for pine barrens tree frogs and therefore warrants a reclassification from wetlands of exceptional resource value to wetlands of intermediate resource value; and

It appearing that the issues to be decided by Administrative Law Judge Duncan in the December 20, 1991

Order of Remand have been fully resolved, and good and sufficient cause appearing,

It is on this 16th day of March, 1992, **ORDERED**

1. That the Department of Environmental Protection and Energy reclassify the land described in Exhibit A from exceptional resource value to intermediate resource value wetlands; and

2. That the Department of Environmental Protection and Energy shall issue forthwith an Individual Freshwater Wetlands Permit with appropriate conditions. If the petitioner objects to the conditions attached, he shall have the right of appeal.

All issues transmitted by the Commissioner in the December 20, 1991 Order of Remand to the OAL on January 8, 1992, having been resolved, the matter is hereby dismissed as moot.

/s/ M. Kathleen Duncan
M. Kathleen Duncan, ALJ

We hereby consent to the form and the entry of the foregoing Order:

Berry Kagan and Sahradnik
Attorneys for petitioner,
Darwin R. Griffith

DATED 3/13/92

By: /s/ Seymour J. Kagan
Seymour J. Kagan, Esq.
A Member of the Firm

Robert J. Del Tufo
Attorney General of New Jersey
Attorney for respondent,
State of New Jersey, Department of Environmental Protection and Energy

DATED: March 16, 1992

BY: /s/ Karen Lynn Hershey, DAG
Karen Lynn Hershey, DAG

am

[LOGO] [SEAL]

STATE OF NEW JERSEY

DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

(See Issuing Division below)

PERMIT*

The New Jersey Dept. of Environmental Protection & Energy grants this permit in accordance with your application, attachments accompanying same application, and applicable laws and regulations. This permit is also subject to the further conditions and populations enumerated in the supporting documents which are agreed to by the permittee upon acceptance of the permit.

Permit No.
1516-880052.1IP

Application No.
Same as Permit No.

Issuance Date
June 25, 1992

Effective Date
June 25, 1992

Expiration Date
June 25, 1992

Name and Address of Applicant
Darwin R. Griffith
11 Lincoln Circle
Chatham, NJ 07928

Name and Address of Owner
Same as applicant

---

* *The word permit means "approval, certification, registration, etc."*

Name and Address of Operator
Same as applicant

Location of Activity/Facility *(Street Address)*
Nugentown Road
Little Egg Harbor Township
Ocean County
Lot 33 Block 78

Issuing Division
Land Use Regulation

Statute(s)
NJSA 13:9B
NJSA 58:10A-1

Type of Permit
Individual Freshwater Wetlands Water Quality Certificate

Maximum Approved Capacity, if applicable
NA

This permit grants permission to:

Construct an access road, from Nugentown Road through freshwater wetlands adjacent to Mill Branch to uplands, with the toe of slope located along the property boundary of adjacent Lots 28 and 29. The access road will have a center line length within wetlands of approximately 500 feet, 16 feet cartway width, no shoulders and 2:1 side slopes. The permittee has not proposed any project or development on this site other than an access road.

This permit is authorized pursuant to Consent Order OAL DKT. NO. ESA 204-92 (ESA 910-91 on remand) AGENCY DKT. NO. 91-0039, Ordered on March 16, 1992.

This permit is issued subject to approval of a Federal Section 404 Permit and a Stream Encroachment Permit. The issuance of this Individual Permit shall not prejudice any additional approvals required.

Prepared by: /s/ William T. Dixon
William T. Dixon

Page 1 of 3

Revised date

Approved by the Department of Environmental Protection and Energy

Name (Print or Type) _____ Title _____

Signature _____ Date _____

The word permit means "approval, certification, registration, etc."

This permit is subject to the following *general conditions:*

1. This permit is revocable, or subject to modification or change at any time, pursuant to the applicable regulations, when in the judgement of the department of Environmental Protection and Energy of the State of New Jersey such revocation, modification or change shall be necessary.
2. The issuance of this permit shall not be deemed to affect in any way action by the Department of Environmental Protection and Energy of the State of New Jersey on any future application.
3. The works, facilities, and/or activities shown by plans and/or other engineering data, which are this day approved, subject to the conditions herewith established, shall be constructed and/or executed in conformity with such plans and/or engineering data and the said conditions.

4. No change in plans or specifications shall be made except with the prior written permission of the Department of Environmental Protection and Energy of the State of New Jersey.

5. The granting of this permit shall not be construed to in any way affect the title or ownership of property, and shall not make the Department of Environmental Protection and Energy or the State a party in any suit or question of ownership.

6. This permit does not waive the obtaining of Federal or other State or local government consent when necessary. This permit is not valid and no work shall be undertaken until such time as all other required approvals and permits have been obtained.

7. A copy of this permit shall be kept at the work site, and shall be exhibited upon request of any person.

8. In cases of conflict, the conditions of this permit shall supersede the plans and/or engineering data:

If the permittee, in the future, receives all the required approvals for development of sufficient size on the upland of lot 33, the permittee may apply for a major modification of this permit for a wider access road. However any proposed modification will have to be in compliance with the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A) to receive approval.

The permittee shall allow a authorized Program representative the right to inspect construction pursuant to N.J.A.C. 7:7A-13.1(a)9.

This permit shall be RECORDED in the office of the County Clerk (the REGISTRAR OF DEEDS AND MORTGAGES in the applicable counties) in the county wherein the lands included in the permit are located within ten

(10) days after receipt of the permit by the applicant and verified notice shall be forwarded to the Land Use regulation Program immediately thereafter.

This permit is NOT VALID until the permit acceptance form has been signed by the applicant, accepting and agreeing to adhere to all permit conditions, and returned to the Land Use Regulation Program at CN 401, Trenton, NJ 08625.

This permit is issued subject to and provided all the following conditions, in addition to the required conditions set forth in N.J.A.C. 7:7A-13.1, can be met to the satisfaction of the Land Use Regulation Program: All conditions must be met prior to construction unless otherwise specified.

Administrative Conditions:

1. Prior to construction submit for review and approval three copies of a revised site plan accurately depicting the approved access road as permitted above, including the exact amount of wetlands to be filled and quantity of fill required.
2. Prior to construction, receive written authorization from the Department of the Army, Army Corps of Engineers Philadelphia District, pursuant to section 404 of the Clean Water Act.
3. Prior to construction receive a Stream Encroachment Permit pursuant to the Flood Hazard Area Control Act (N.J.S.A. 16A-50).
4. Prior to the commencement of any construction in freshwater wetlands, the applicant shall submit a mitigation plan to this office and receive written approval. The plan shall demonstrate compliance with requirements for wetland mitigation noted at

N.J.A.C. 7:7A-14.1 et seq. The permittee, Darwin R. Griffith shall be responsible for monitoring this mitigation and the success of the mitigation plan. The mitigation must be carried out prior to or concurrently with the road project.

5. You must notify the Bureau of Coastal and Land Use Enforcement at P.O. Box 188, Duerer Road, Pomona, NJK 08240 in writing at lease three (3) working days prior to commencement of construction or site preparation, as per N.J.A.C. 7:7-1.5(b)1.

Physical Conditions:

1. All wetlands disturbances must be stabilized in accordance with applicable Best Management Practices, and replanted in accordance with the mitigation plan using indigenous species.

2. The project must meet Soil Erosion and Sediment Control Standards and be approved by the Ocean County Soil Conservation District. The applicant shall be responsible for daily inspections of the project area to determine if the erosion control measures are functioning as intended.

6/25/92
DATE

/s/ Ruth Ehinger
for Robert A. Tudor,
Administrator
Land Use Regulation Program

[LOGO]

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION
FOR SUMMARY DECISIONS
OAL DKT. NO. EWR 8375-92
AGENCY DKT NO.
1516-88-0052.1

**DARWIN GRIFFITH/
TALL CEDARS,**

Petitioner,

v.

**DIVISION OF WATER
RESOURCES, DEPARTMENT
OF ENVIRONMENTAL
PROTECTION AND ENERGY,**

Respondent.

Seymour J. Kagan, Esq., for petitioner
(Berry, Kagan & Sahradnik, attorneys)

Marcia M. Michaels, Deputy Attorney General, for respondent
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

BEFORE RONALD I. PARKER, ALJ:

STATEMENT OF THE CASE

This matter originated as an appeal by petitioner, Darwin Griffith/Tall Cedars (Tall Cedars), from conditions placed on an Individual Freshwater Permit by the New Jersey Department of Environmental Protection and Energy (DEPE or Department). Specifically, petitioner objects to two conditions: The relocation of an access road and the necessity of petitioner applying at some time in the future for a permit to modify and widen the road in question.

PROCEDURAL HISTORY

On August 12, 1988, petitioner submitted to respondent an application for an Individual Freshwater Wetlands Permit and Water Quality Certificate for the purpose of constructing an access way from Nugentown Road to the site in question, which would require the filing [sic] of approximately .46 acres of wetlands. The purpose of the project was "to obtain fair market value for the site." This matter was initially transmitted to the Office of Administrative Law (OAL) on December 19, 1989, by the Department for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 after respondent denied petitioner's application.

This was assigned to Administrative Law Judge M. Kathleen Duncan. Subsequently, ALJ Duncan rendered an Initial Decision that was rejected by the Commissioner of the DEPE. After remand to the OAL, ALJ Duncan determined that respondent accepted "petitioner's contention that Nugentown Road was the only practicable access to the subject property." Thereafter, ALJ Duncan determined

that the remaining issues were beyond the jurisdiction of the OAL (specifically the width of the cartway) and in a second Initial Decision dismissed the matter as being moot. The Commissioner of DEPE once again remanded the matter to the OAL for a determination of "(1) whether the project site is appropriately classified as exceptional resource value wetlands and (2) if it is, whether the application satisfied the criteria of N.J.A.C. 7:7A-3.3." On March 16, 1992, a Consent Order was entered after the parties settled the remaining issues.

In a telephone prehearing conference on March 9, 1993, the parties agreed to the filing of cross-motions for summary decisions. The DEPE submitted a Notice of Motion for Summary Decision with supporting brief and appendix dated March 30, 1993, and received on April 1, 1993, with a response brief in support of the motion, dated April 8, 1993, being received from petitioner on April 12, 1993. A letter "brief response," dated April 22, 1993, was received from respondent on April 23, 1993. Petitioner then submitted a "reply" letter brief, dated May 5, 1993, and DEPE was granted an opportunity to answer and did so on May 11, 1993, which was received at the OAL on May 13, 1993. The record closed on that date.

ISSUES

The two issues before the undersigned are whether the Department acted pursuant to applicable statutes and regulations in attaching conditions to a previously agreed to Freshwater Wetland Permit granted to petitioner and

whether the condition requiring a sixteen-foot cartway is an appropriate limitation.

FINDINGS OF FACT

Based upon the prehearing order and submissions by the petitioner and respondent, I FIND the following FACTS:

1. The property in question lies along the north side of Nugentown Road and consists of sixty-three acres, twenty-three acres of which consists of wetlands.
2. The property, which currently exists in its natural, undeveloped, and vacant state, has legal access to Nugentown Road, but that access requires a permit from the Bureau of Freshwater Wetlands.
3. Access to Bridge Road via the access easement across lot 21A would also require a Freshwater Wetlands permit.
4. Griffith submitted an application to the DEPE on or about August 12, 1988, for an Individual Freshwater Wetlands Permit for the purpose of constructing an access way from Nugentown Road to the site in question, which would require the filling of approximately .56 acres of wetland.
5. The purpose of the proposed project as stated in petitioner's application "is to obtain fair market value for the site."
6. Respondent and petitioner previously agreed to settle the initial application contested cases on March 16, 1992, and the ALJ issued a Decision Approving Settlement incorporating the terms of a Consent Order prepared by the parties.

7. The Consent Order never addressed the conditions that were to be set in the permit, only that a permit was to be issued.

LEGAL DISCUSSION AND CONCLUSIONS

1. Standards for Summary Decision

Administrative summary decisions are governed by N.J.A.C. 1:1-12.5(b), which reads:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The standards enunciated in N.J.A.C. 1:1-12.5(b) are similar to those for a summary judgment motion found in R. 4:46-2. Consequently, the cases interpreting R. 4:46-2 are binding.

The role of the judge in a summary decision motion is to determine whether there is a genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 73 (1954). Summary decision is designed to allow the judge to quickly and inexpensively dispose of any

case which does not present any genuine issue of material fact requiring disposition at a hearing. *Id.* at 74.

The standards of governing the grant or denial of a summary decision emphasize that a party opposing a motion is not to be denied a hearing unless the moving party maintains the burden of showing *clearly* the absence of a genuine issue of material fact. Thus, it is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact. All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting a motion are closely scrutinized and *the opposing papers indulgently treated. Id.* at 75. Summary judgment is a relief that should be carefully and diligently considered and should be *granted with caution. Delvin v. Surgent*, 18 N.J. 148, 154 (1955).

An opposing party will not succeed in defeating the motion, however, "without factual support in tendered affidavits." *U.S. Pipe & Foundry Co. v. American Arbitration Ass'n*, 67 N.J. Super. 384, 399 (App. Div. 1961). If the opponent offers no affidavit, he or she cannot complain if the court takes "as true the statement of uncontradicted facts in the papers relied upon by the moving party" and eventually grants summary decision. *Judson*, 17 N.J. at 75. Notwithstanding, the movant must prove that he or she is entitled to summary decision. If material issues of fact exist, the case is not yet ripe for summary decision.

2. Discussion of fact and law

The Freshwater Wetlands Protection Act was created by the New Jersey Legislature in 1987, to become effective July 1, 1988. The Legislature's purpose in creating the Act is that

> in order to advance the public interest in a just manner, the rights of persons who own or possess real property affected by this Act must be fairly recognized and balanced with environmental interest; and that the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater wetlands losses, are distinct from and may exceed the private value of wetland areas.
>
> [N.J.S.A. 13:9B-2.]

N.J.S.A. 13:9B-9b mandates that the DEPE shall issue a freshwater wetlands permit only if it finds that the regulated activity:

> (3) Will result in *minimum feasible* alteration impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of the freshwater wetland. [Emphasis added.]

Moreover, N.J.S.A. 13:9B-13a further directs that:

> The *Department shall require as a condition of a freshwater wetlands permit that all appropriate* measures have been carried out to mitigate adverse environmental impacts, restore vegetation, habitats, and land and water features, prevent sedimentation and erosion, [and] . . . *minimize the area of freshwater wetland disturbance.* [Emphasis added.]

DEPE moves for summary decision to dismiss petitioner's appeal of conditions placed on a permit for an access road on property located within freshwater wetlands because "the Department has determined that in order to effectively carry out its legislative mandate, the conditions placed on the individual freshwater wetlands permit are necessary. As such, respondent . . . maintains that judicial intervention as to the actual conditions of the permit is not appropriate."

The Department further states that siting the access road as the DEPE sets forth and not as proposed by the petitioner would result in a minimal impact on wetlands. "Anything other than minimal impact would contravene the Freshwater Wetlands Protection Act . . . though siting the road according to the specification may require local variances, the Department has determined that this would result in a wetland impact of .25 acres as opposed to an impact of .56 acres as proposed by the applicant."

Respondent relies in part, upon an earlier decision by ALJ Duncan, adopted in part and remanded in part by the Commissioner of DEPE, involving the present parties and issues. In that decision, ALJ Duncan stated "that the OAL had no jurisdiction to determine the freshwater wetlands permit conditions, specifically the width of the cartway . . . *since these issues were not set forth in the Department's January 25, 1991 remand." Darwin R. Griffith v. Division of Coastal Resources, N.J. Dept. of Environmental Protection*, OAL DKT. ESA 910-91 (August 7, 1991), adopted, DEPE (Dec. 20, 1991) (emphasis added). However, ALJ Duncan's decision did not conclude, nor did Commissioner Weiner in his final decision conclude, that it was beyond the purview of the OAL because DEPE had

stipulated that Nugentown Road was the only practicable access, but that the issue as to the actual permit conditions had not yet been set forth before the DEPE. While DEPE concludes that "the issues for which the matter was remanded for determination had been resolved by virtue of the Department's stipulation that the Nugentown Road access is the only practicable alternative," I FIND that the permit condition could not be addressed in that prior decision and is therefore an issue in the current matter, since the Commissioner has specifically transmitted to the OAL as a contested case petitioner's appeal of such a determination.

Petitioner alleges in its cross-motion for summary decision that the conditions attached to the permit issued by the respondent relocates said access road, thereby requiring petitioner to obtain a variance from the township since the relocation by respondent of the proposed access road fails to satisfy subdivision ordinances of local authorities. Due to the relocation of the access road, petitioner contends that the permit conditions are either "technically, economically, and/or legally invalid."

In effect, petitioner wants the access road to be made wider. It is now, pursuant to the permit issued, to be made at sixteen feet in width, and petitioner wants it to be thirty feet wide since "the 16ft cartway width will negatively impact upon the marketability of the property be creating false doubt and uncertainty as to the property's actual development."

Petitioner also claims that the application submitted to the DEPE in August 1988 indicated that the total wetlands disturbance resulting from the construction of

the proposed access road is only .47, not .56 acres as claimed by respondent. Respondent argues that whether .47 acres or .56 acres are effected, its alternative would have an *even lesser adverse wetlands* impact while effectuating the purpose of the *project proposed*.

Petitioner purports that in relocating the proposed access road, respondent has failed to consider several crucial factors which directly militate against the approval of such an access road by the local authorities. One such crucial factor would allegedly result in either a denial of approval by the local authorities, because of the relocation of petitioner's proposed access road, according to the conditions set by respondent in the permit, or at least require the obtaining of a variance from the local authorities, which would be difficult. It is argued that the required *toe of slope* located along the property line of Lots 28 and 29 would necessitate an *unwarranted taking of real property* located in Block 78, Lot 28, because petitioner alleges it holds no interest in that property.

Another claim by petitioner is that the cartway width of the access road, as set by respondent, "undermines Petitioner's ability to presently pursue the marketing of the property." I therefore FIND that a genuine issue as to a material fact clearly exists between the parties on this issue.

Petitioner also alleges in support of his cross-motion for Summary Decision and in opposition to respondent's motion for summary decision the following about the conditions attached to the permit:

> (3) it conflicts with a property owner's highest and best use of his property; Ibid, pages 10-14.

(4) location and width of access road contravene both *express* and implied *intent* of Freshwater Wetlands Permit Act, is to balance the private property owner's interest with environmental interest.; Ibid, page 6.

(5) the access road as set forth in the conditions granted by DEPE with *toe of slope located along the property line of lots 28 and 29* would not constrain the *prescribed sight triangle* to areas located within the boundaries of Petitioner's property, one sight triangle would invade lot 28, and therefore the relocation of the access road by DEPE would necessitate an unwarranted taking of property located in Block 78, Lot 28, which Petitioner alleges he holds no interest in.

[*Petitioner's April 12, 1993 brief at 7.*]

In addition to the above arguments set forth by the petitioner, it also alludes to several items which it erroneously perceives to be issues in dispute between the parties. Petitioner has numbered these alleged issues one through five.

Alleged issue number one of petitioner's brief states that "the Permit improperly reflects an expiration date of June 25, 1992." This is a nonissue since the respondent has *agreed* that the permit is effective for a five-year period. (emphasis added).

Again, in alleged issue number three of petitioner's brief, page three, "the permit should recognize the reclassification of the Wetlands on petitioner's property from exceptional resource value to intermediate resource

value." The respondent has also agreed to the reclassification of the wetlands on petitioner's property, as memorialized in the Consent Order, dated March 16, 1992.

Finally, petitioner's alleged issues, two, four, and five have all been stipulated by the respondent, as DEPE has stated its willingness to accommodate petitioner as to these *technical concerns*. Furthermore, petitioner has also agreed with the respondent since petitioner has stated, "issues 1 through 5 set forth above can be resolved without the need for judicial intervention."

Here, we find that petitioner has only submitted an application for a proposed access road, and not a proposed access road for property which has already obtained the necessary major subdivision approvals. Petitioner in effect asks the DEPE to grant it an open ended modification to the permit as it now exists. Specifically, petitioner wants the permit to read, "In the *future* event that the permittee receives the *mandated approvals for a major subdivision on the uplands of Lot 33*, and that approval requires an access road having a cartway width exceeding 16 feet, but not exceed 30 feet, the permittee *need not apply for further modification* of this Freshwater Wetlands permit in order to acknowledge the *ultimately approved road width*." (Emphasis added.) Respondent, while not disputing the municipal ordinance attached to petitioner's brief as an exhibit, does argue that "the Department cannot and should not be expected to address specifics which are not part of anm [sic] actually proposed project."

I therefore FIND that petitioner intends to sell this property and not build on it. I further FIND that it would be in direct contravention of the "Act" to automatically assent to the petitioner's request for modification of the conditions placed on the permit since there would be a greater impact on the wetlands if the the road were widened. Petitioner has been given what the petitioner has requested, a permit for an access road, and not a permit for an access road for a major subdivision. By petitioner's own argument, the access road must be widened only to be in sync with the local ordinances requirement, but only for a major subdivision. Respondent has balanced the private property owner's interest with the mandate of the Act. In light of the above, respondent cannot, in balancing the interests in this matter, grant an open-ended permit without any knowledge, except for petitioner's assurances, of what the upland property will be ultimately used for. Ultimately, the decision to grant a modification of the width of the access road rests with the mandated approvals for a major subdivision, as petitioner has acknowledged.

I therefore FIND that the express mandate of the controlling statute is clear and that respondent is allowing for the least invasive means of impact while granting petitioner's proposed access road to be built, affecting .25 acres and not .56 or .47. The mandate is to reduce the amount of impact, and respondent does this while allowing petitioner to still build the access road, achieving a balancing of petitioner's property interest right and the environmental mandate of the Freshwater Wetlands Act.

CONCLUSION

Applying the standards as set forth in above-cited case law and pursuant to N.J.A.C. 1:1-12.5(b), I CONCLUDE that while a balancing of the interests herein, the DEPE has established its position regarding the width of the cartway, the petitioner has presented a material issue as to a genuine fact (*i.e.*, if petitioner were to conform to the permit requirements, would it in order to build the access road in conformance with such conditions necessitate a taking of real property for the sight triangles in order to conform to the local ordinances). Therefore, the issue remains to be determined in an evidentiary proceeding pursuant to N.J.A.C. 1:1-12.5(b).

ORDER

I therefore ORDER that both petitioner's and respondent's motions for summary decisions be DENIED and that an evidentiary hearing be held for a determination pursuant to N.J.A.C. 1:1-12.5(b) as to whether the DEPE permit conditions would necessitate the taking of another's property to conform to the cartway's relocation.

This order may be reviewed by the COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

June 23, 1993 /s/ Ronald I. Parker
Date RONALD I. PARKER, ALJ

[LOGO]

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EWR 8375-92
AGENCY DKT NO. 1516-88-0052.1

DARWIN GRIFFITH/
TALL CEDARS,

Petitioner,

v.

DIVISION OF WATER
RESOURCES,
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION AND
ENERGY,

Respondent.

Seymour J. Kagan, Esq., for petitioner
(Berry, Kagan & Sahradnik, attorneys)

Marcia M. Michaels, Deputy Attorney General, for respondent
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: January 28, 1994
Decided: February 2, 1994

BEFORE **RONALD I. PARKER**, ALJ:

STATEMENT OF THE CASE

This matter originated as an appeal by petitioner, Darwin Griffith/Tall Cedars (Tall Cedars), from conditions placed on an Individual Freshwater Permit by the New Jersey Department of Environmental Protection and Energy (DEPE or Department) Specifically, petitioner objects to two conditions. The relocation of an access road and the necessity of petitioner applying at some time in the future for a permit to modify and widen the road in question.

PROCEDURAL HISTORY

On August 12, 1988, petitioner submitted to respondent an application for an Individual Freshwater Wetlands Permit and Water Quality Certificate for the purpose of constructing an access way from Nugentown Road to the site in question, which would require the filing of approximately .46 acres of wetlands. The purpose of the project was "to obtain fair market value for the site." This matter was initially transmitted to the Office of Administrative Law (OAL) on December 19, 1989, by the Department for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 after respondent denied petitioner's application.

This was assigned to Administrative Law Judge M. Kathleen Duncan. Subsequently, ALJ Duncan rendered an Initial Decision that was rejected by the Commissioner of the DEPE. After remand to the OAL, ALJ Duncan determined that respondent accepted "petitioner's contention that Nugentown Road was the only practicable access to the subject property." Thereafter, ALJ Duncan determined

that the remaining issues were beyond the jurisdiction of the OAL (specifically the width of the cartway) and in a second Initial Decision dismissed the matter as being moot. The Commissioner of DEPE once again remanded the matter to the OAL for a determination of "(1) whether the project site is appropriately classified as exceptional resource value wetlands and (2) if it is, whether the application satisfied the criteria of N.J.A.C. 7:7A-3.3" On March 16, 1992, a Consent Order was entered after the parties settled the remaining issues.

In a telephone prehearing conference on March 9, 1993, the parties agreed to the filing of cross-motions for summary decisions. The DEPE submitted a Notice of Motion for Summary Decision with supporting brief and appendix dated March 30, 1993, and received on April 1, 1993, with a response brief in support of the motion, dated April 8, 1993, being received from petitioner on April 12, 1993. A letter "brief response," dated April 22, 1993, was received from respondent on April 23, 1993. Petitioner then submitted a "reply" letter brief, dated May 5, 1993, and DEPE was granted an opportunity to answer and did so on May 11, 1993, which was received at the OAL on May 13, 1993.

Thereafter on June 23, 1993 the undersigned issued an Order Denying Motions for Summary Decision because of the existence of a genuine issue of material fact (i.e., whether the conditions of the permit necessitate a taking of real property for sight triangle requirements mandated by local ordinances). Respondent has subsequently on January 25, 1994 submitted the affidavit of William T. Dixon indicating DEPE's willingness to adjust the access way to comply with local sight triangle

requirements, the only remaining outstanding fact issue therefore being resolved in favor of DEPE.

CONCLUSION

I therefore **CONCLUDE** that since all other applicable issues of law addressed in the undersigned's Order of June 23, 1993 have been determined in favor of DEPE, there are no remaining issues of material fact in this appeal.

ORDER

I therefore **ORDER** that the petitioner's Cross-Motion for Summary Decision is denied and respondent's Motion for Summary Decision is **GRANTED** and DEPE's issuance of the permit with conditions is **AFFIRMED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY**, who by law is authorized to make a final decision in this matter. If the Director of the Division of Motor Vehicles does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any

party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, marked "Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

February 4, 1994
Date

/s/ Ronald I. Parker
RONALD I. PARKER, ALJ

Agency Receipt:

2-4-94
DATE

/s/ Vera M. Werts
DIVISION OF MOTOR VEHICLES

Mailed to Parties:

Feb. 22, 1994
DATE

/s/ Jaynee L. LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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[LOGO]

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND ENERGY

OFFICE OF THE COMMISSIONER
CN 402
TRENTON NJ 08625-0402
TEL. # 609-292-2885
FAX. # 609-292-7695

CHRISTIE TODD WHITMAN
GOVERNOR

ROBERT C. SHINN, JR.
COMMISSIONER

FINAL DECISION
OAL DKT. NO. EWR 8375-92
AGENCY DKT. NO. 1516-88-0052.1

**DARWIN GRIFFITH/
TALL CEDARS,**
Petitioner,

v.

**DEPARTMENT OF
ENVIRONMENTAL
PROTECTION AND
ENERGY, LAND USE
REGULATION
PROGRAM,**

Respondent.*

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* Respondent in this matter, erroneously captioned earlier in these proceedings as "Division of Water Resources, Department of Environmental Protection and Energy," has been correctly denominated above as "Department of Environmental Protection and Energy, Land Use Regulation Program."

The June 23, 1993 Order Denying Motions for Summary Decisions (Order) and the February 2, 1994 Initial Decision of the Administrative Law Judge (ALJ) in this matter have been reviewed and are herein **ADOPTED** in part with **MODIFICATION**. This matter arises from an appeal by Petitioner Darwin Griffith/Tall Cedars (Tall Cedars) raising seven issues in connection with an Individual Freshwater Wetlands Permit and Water Quality Certificate (Permit) issued by Respondent Department of Environmental Protection and Energy (Department) authorizing the construction of an access road through freshwater wetlands. The project site consists of 63 acres, containing 40 acres of uplands, in Little Egg Harbor Township, Ocean County.

The Department issued the Permit with conditions on June 25, 1992. The permit authorizes Tall Cedars' construction of an access road of approximately 500 feet in length and 16 feet in width, requiring the filling of approximately one-half acre of freshwater wetlands. Tall Cedars requested an adjudicatory hearing raising seven issues. These issues included the Department's authority to require Tall Cedars to relocate the proposed access road so as to have an impact on any potential development of the adjacent property*; the Department's authority to limit the proposed road's width to 16 feet, and five additional "technical" issues addressed more fully below.

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* This issue was rendered moot by the Department's agreement, contained in the Department's January 12, 1994 affidavit, to adjust the relocation so that conformance to local ordinances could be accommodated entirely within the boundaries of the subject property.

For the reasons given in the Order, I **ADOPT** the conclusion of the ALJ affirming the Department regarding the access road width with respect to its maximum width. The access road that Tall Cedars is authorized to construct under the Permit is limited to 16 feet in width.

For the reasons give below, I **MODIFY** the Permit condition under which Tall Cedars may secure authorization for a wider access road. This condition as originally written provides that Tall Cedars may apply at some future date for a major modification to the Permit to authorize a wider access road, but only after it obtains all the required approvals for the upland development that would require the wider access road. I find no authority for first requiring Tall Cedars to *first* obtain such approvals. Accordingly, I hereby direct the Department to change this condition to allow Tall Cedars to now apply for and, if approvable under the substantive criteria of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 *et seq.*, receive the major modification to the Permit it wishes. Tall Cedars must, however, first submit all necessary information, including plans for its proposed major subdivision, for the Department to evaluate its proposed modification to the Permit. Any such Permit modification, however, shall be issued with the condition that construction on an access road wider than 16 feet may commence only after Tall Cedars has obtained all necessary approvals for its proposed development of a major subdivision.

For the reasons given below, I **MODIFY** the conclusion of the ALJ that the five additional "technical" issues are not issues in dispute, but only as necessary to (1) affirm the Department's determination not to include

specific language in the Permit recognizing that the freshwater wetlands in question are of intermediate resource value; (2) affirm the Department's determination not to include specific language in the Permit recognizing that Tall Cedars has a transition area waiver for the proposed access road; (3) direct the Department to change the effective date of the Permit to read "upon satisfaction of all conditions precedent"; (4) direct the Department to change the expiration date of the Permit to read "June 25, 1997"; and (5) direct the Department to change the second sentence of Permit Physical Condition 2 to read "[t]he applicant shall be responsible for complying with the standards and regulations of the Ocean County Soil Conservation District."

Regarding the issue of stating the resource value of the freshwater wetlands in the Permit itself, the Department has agreed that the freshwater wetlands located on Tall Cedars' property are of intermediate resource value. The reclassification of these wetlands by the Department, from extraordinary to intermediate resource value, has already been memorialized in the March 16, 1992 Consent Order to which the Department and Tall Cedars were parties. Accordingly, there is no discernable basis or need for Tall Cedars' requesting the Department's deviation from its ordinary practice of not including the freshwater wetlands resource value in the Permit.*

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* The reclassification has absolutely no effect on the Tall Cedars' Permit. Rather, it would entitle Tall Cedars to certain general permits, a reduction in the size of the transition (wetlands buffer) area, and a less stringent standard of review for the individual permit (which, because Tall Cedars has already received the Permit, it no longer needs).

Regarding the transition area waiver issue, under the terms of N.J.A.C. 7:7A-7.1(f), the Permit automatically includes a transition area waiver allowing encroachment in the adjacent transition area as necessary to accomplish the regulated activity authorized under the Permit. Since Tall Cedars has this waiver by operation of law, there again is no basis or need for satisfying Tall Cedars' requesting the Department's deviation from its ordinary practice of not including the transition area waiver in the Permit.

Regarding the issue of the effective and expiration dates of the Permit, there can be no doubt, as Tall Cedars alleges, that the effective date of June 25, 1992 is erroneous. N.J.A.C. 7:7A-14.1(e) provides that the "[P]ermit will not become effective until the deed restriction [executed in connection with a wetlands mitigation plan] is registered with the county clerk." Since the required deed restriction for areas subject to wetlands mitigation has yet to be recorded, the Permit is not yet effective.

There is no basis, however, for Tall Cedars' contention that the Permit should provide for a term of five years from its *effective* date. While N.J.A.C. 7:7A-13.3 provides that permits are effective for a fixed period *not to exceed five years,* the provision does not require that they be effective for a full five years from their effective date. The Department is authorized to issue permits with effective periods of less than five years. Accordingly, the Department has the authority, as it has done in this case, to issue a permit for five years duration from its date of issuance.

Any inability of the permittee to make use of the full five years from the date of issuance, because it must first satisfy conditions before the permit is valid or effective, is within the control of the permittee, not the Department. To carry Tall Cedar's argument to the extreme, if the Department were to issue the Permit valid for a full five years from its effective date as requested by Tall Cedars, Tall Cedars could maintain the Permit for decades merely by failing to satisfy just one condition precedent to its effectiveness. Accordingly, it is both legal and reasonable for the Department to issue the Permit with an expiration date five years from the date of issuance. Tall Cedars may maximize the period of effectiveness of the Permit by expeditiously satisfying all conditions precedent to its effectiveness.

I hereby direct the Department to change the effective date of the Permit so as to become effective only "upon satisfaction of all conditions precedent." I further direct the Department to change the expiration date to "June 25, 1997."

Finally, as the Department has consented to Tall Cedars' request to revise the Permit with respect to erosion control measures as specified above, no further analysis of this issue is necessary.

DATE: 5/25/94 /s/ Robert C. Shinn, Jr.
ROBERT C. SHINN, JR.,
Commissioner
Department of Environmental
Protection and Energy

[SEAL]

State of New Jersey
Department of Environmental Protection
Land Use Regulation Program
CN 401, Trenton, New Jersey 08625-0401

Christine Todd Whitman
Governor

Robert C. Shinn, Jr.
Commissioner

Mr. Seymour Kagen
212 Hooper Avenue
P.O. Box 757
Toms River, NJ 08754

RE: Individual Freshwater Wetlands Permit
Modification
Tall Cedars
LURP File No. 1516-88-0052.1 IP
DOL Dkt. No. 94-71054
Block 78; Lot 33
Little Egg Harbor Township, Ocean County

Dear Mr. Kagen:

I am writing in response to your September 13, 1996 letter regarding the referenced permit modification. Specifically, you expressed concern that the issued modification did not clearly reflect the record in this matter.

Based on the information contained in your letter, a review of the permit files, and my conversations with D.A.G. Alyssa Pearlman Wolfe. I would like to clarify these issues as follows:

1. The description of the location of the approved access road in the original permit, dated June 25, 1992, is hereby Amended. The approved roadway location is shown on a plan titled "Plan of Access Road for Block 78, Lot 33,"

Drawing No. 9791, Project No. 0452, prepared by Fellows, Read & Associates, Inc., dated July 15, 1988.

2. Physical Condition 2 of the original permit dated 6/25/92 is hereby amended, as follows:

> The permittee shall be responsible for complying with all standards and regulations of the Ocean County Soil Conservation District.

3. Condition 1 of the Permit Modification issued in a letter from the Department to Darwin Griffith, dated August 14, 1996, is hereby deleted, and Condition 2 is amended to read as follows:

> The Permittee shall obtain any and all required Federal, state, county or municipal approvals, permits, variances, etc., for construction of all development on this site.

I hope that this letter clarifies the issues related to the permit and subsequent modification. If you have any additional questions, please contact me at the above address or at (609) 292-8262.

Sincerely,

/s/ Mark N. Mauriello
Mark N. Mauriello,
Supervisor
Bureau of Coastal Regulation

c: Alyssa Pearlman Wolfe, D.A.G.
Darwin Griffith (11 Lincoln Circle, Chatham, NJ 07928)
Municipal Planning Board
Municipal Construction Official

[SEAL]

State of New Jersey

Department of Environmental Protection

Christine Todd Whitman
Governor

Robert C. Shinn, Jr.
Commissioner

Certified Mail

December 2, 1994

R. Bradley Tombs
Normandeau Associates, Inc.
170 Oberlin Avenue North
Lakewood, NJ 08701

RE: CAFRA Permit Application Cancellation
File No.: 1516-93-0088.2
Tall Cedars
Block 78; Lot 33
Little Egg Harbor Township, Ocean County

Dear Mr. Tombs:

You are hereby notified that CAFRA Permit Application No. 1516-93-0088.2 has been cancelled effective December 2, 1994, due to your failure to submit the additional information requested by this office on July 29, 1994, August 9, 1994 and September 20, 1994.

If you choose to submit a new application for a CAFRA permit, your application shall be considered without prejudice. Please be advised that any new application must demonstrate compliance with the Rules on Coastal Zone Management (N.J.A.C. 7:7E-1.1 et seq.) as amended on July 18, 1994. If you reapply within one year a permit fee is not required.

If you have any further questions about this matter, please contact William Dixon of my staff at the above address or by phone at (609) 292-8262.

Sincerely,

/s/ Ruth Ehinger
Ruth Ehinger, Manager
Bureau of Coastal Regulation

c: Bureau of Coastal & Land Use Enforcement, Pomona
Office of Land and Water Planning
Nancy Milsten, Commissioners Office
Marcia M. Michaels, DAG
Little Egg Harbor Township Clerk
Little Egg Harbor Township Planning Board
Little Egg Harbor Township Construction Official
Ocean County Planning Board

[SEAL]

State of New Jersey

Department of Environmental Protection

Environmental Planning
Bureau of Water Planning
CN 418, Trenton, NJ 08625-0418

Mr. James Stanton
O'Donnell, Stanton & Associates, Inc.
10 Allen Street
PO Box 2133
Toms River, New Jersey 08754

RE: Tall Cedars
Block 78, Lot 33
Little Egg Harbor Township
Wastewater Management Plan
Proposed Amendment to the
Ocean County Water Quality Management Plan

Dear Mr. Stanton:

In reviewing the Department of Environmental Protection's (Department) January 6, 1995 letter, it appears that the language may have been unclear in explaining the regulatory justification used for disapproval of the above referenced proposed amendment relative to the Coastal Area Facility Review Act (CAFRA) and the Pinelands Comprehensive Management Plan issues. This letter supersedes my letter of January 6, 1995.

All proposed amendments to the Department are reviewed by the Plan Amendment Committee (PAC). Pursuant to the Statewide Water Quality Management Planning Rules (N.J.A.C. 7:15-3.6(a)), the Department's Rules

on Coastal Zone Management (N.J.A.C. 7:7E) shall provide the basic policy direction for water quality management planning in the New Jersey coastal zone defined at N.J.A.C. 7:7E-1.2(b). The PAC review includes an examination for consistency with the Rules on Coastal Zone Management.

The Department is guided in Coastal Zone Management decision making by eight basic coastal policies. Two of these require that the Department protect and enhance the coastal ecosystem and concentrate, rather than disperse, the pattern of coastal development and encourage the preservation of open space. To further these goals, the coastal zone has been divided into growth regions.

The Tall Cedars site is a forested site located within the Mullica-Southern Ocean Region's limited growth region. Limited growth regions are areas within the coastal zone where protection of the ecosystem and preservation of open space are paramount. The general policy in these areas is that conservation is more important than development and environmental sensitivity is therefore weighted more heavily than in other growth areas. In the Mullica-Southern Ocean Region in particular, the concern is conservation of the natural environment. The spread of sewered development must, therefore, be highly restricted.

The proposed extension of the sewer service area would create a potential to disperse development into existing undeveloped areas of the limited growth region and allow for a higher density of development within this

region. Therefore, the proposed amendment is inconsistent with the Rules on Coastal Zone Management (N.J.A.C. 7:7E).

Furthermore, a portion of Block 78 Lot 33, located in the Pinelands National Reserve Rural Development Area, continues to be shown in the proposed sewer service area. Sewer service would only be permitted in a Rural Development Area designation to correct an existing public health hazard. Since the proposed amendment is solely to address new development, the proposal to expand the sewer service area is inconsistent with the Pinelands Comprehensive Management Plan (7:50-5.26(b)10).

As the proposed amendment is inconsistent with the Rules on Coastal Zone Management and the policies which govern the Pinelands Comprehensive Management Plan, the proposed amendment to the Ocean County Water Quality Management Plan continues to be disapproved.

If you have any questions, please call me at (609) 633-1179.

Sincerely,

Daniel J. Van Abs, Ph.D
Assistant Administrator
Office of Environmental Planning

c: Lewis Nagy, Assistant Commissioner, Office of Environmental Planning
Elizabeth I. Allen, Clerk, Little Egg Harbor Township
Little Egg Harbor Township Planning Board
Little Egg Harbor Township Construction Official

Barry J. Brady, Ph.D, The Pinelands Commission
Pietre Waldenmaier, Ocean County Planning Board
Nancy Milsten, DEP Commissioner's Office
Ruth Ehinger, Bureau of Coastal Regulation
Millie DeFeo, Office Of Environmental Planning
Sandra Remboske, Office of Environmental Planning
Marcia M. Michaels, Deputy Attorney General

MRD:TALLURP.DOC

[LOGO]

State of New Jersey
Department of Environmental Protection and Energy
Environmental Regulation
Land Use Regulation Program
CN 401
Trenton, NJ 08625-0401
Tel. # 609-984-3444
Fax. # 609-292-8115

Jeanne M. Fox
Acting Commissioner

Ernest P. Hahn
Administrator

R. Bradley Tombs
Normandeau Associates, Inc.
170 Oberlin Avenue North
Lakewood, NJ 08701

NOV 22 1993

RE: Pre-Application Conference Clarification
File No. 1516-93-0088.1
Tall Cedars Subdivision
Darwin Griffith
Block 78, Lot 33
Little Egg Harbor Township, Ocean County

Dear Mr. Tombs:

This letter is in response to your September 7, 1993 letter requesting further clarifications to the Program's August 9, 1993 post pre-application conference letter. Please understand that the following informal guidance and initial assessment is not a binding commitment, and does in no way reflect a decision by this Department or Program to approve or deny any forthcoming permit application for this project or site.

Freshwater Wetlands IP

Based on the information submitted, the proposed project would require a Major Modification to the Freshwater Wetlands Permit No. 1516-880052.1IP for the construction of stormwater outfalls, widening and relocating the permitted access road and conducting any regulated activities within the transition area. The applicant would be required to minimize disturbance and adequately mitigate for that disturbance. The Program realizes that with most stormwater management systems there is a need for at least one outfall.

The Program will not reopen the issue of an alternate access to the site through the Freshwater Wetlands or CAFRA permit process provided no significant new information is received that would have affected the OAL settlement to such an extent that the IP issued for the access road through wetlands adjacent to Nugentown Road would not have been authorized. For instance if an adjacent property owner or owners offers complete access through uplands or less impact though wetlands to the site at a reasonable cost, or if there where [sic] clear title from the applicant's easement off of Bridge Road to the site, neither of these options where [sic] available at the time the IP was issued. If the IP Major Modification and CAFRA applications are received complete by the Program simultaneously they would be concurrently reviewed, there would be one public hearing and the decisions would most likely be made at the same time.

With regard to the wetland limit verification, the applicant has two choices either obtain a Letter of Interpretation prior to applying for a permit, or the wetlands

can be verified during the CAFRA review process. If the applicant chooses the later, this office will only need to spot check the line as described in your letter. However, if there is error in that line the entire site may need to be redelineated.

Wetland Mitigation

To date the applicant has not submitted a mitigation plan designed to demonstrate compliance with the mitigation conditions (Subchapter 14 of the Rules) of the access IP. The applicant has indicated on the plan submitted, an area adjacent to the proposed access road as the location of the proposed mitigation. That location is unacceptable for the following reasons: (1) it will require the removal of a mature upland forest area which is discouraged by the Rules (N.J.A.C. 7:7a-14.2(a)2i). and (20 with the access road proposed directly adjacent to the proposed mitigation area the appropriate transition area as required by the Rules (N.J.A.C. 7:7A-14.2(a)2iii) can not be provided. On-site mitigation is impracticable and not ecologically beneficial based on the issues above. Therefore, the mitigation should be carried out off-site but within the same watershed. If the Department determines that a suitable mitigation site can not be obtained in the watershed then the applicant may be directed to a different watershed.

Wetlands Buffer

The Program is unaware of any additional documentation that the applicant is not already aware of, ie. Pine Barrens Tree Frog in the watershed. This office is not

responsible for the maintenance of the endangered and threatened species data base. You may want to contact the Endangered & Non-Game Species and the Natural Heritage Program for more information regarding potential endangered and threatened species habitat on-site. These offices will be reviewing any forthcoming CAFRA application for compliance with the endangered and threatened species habitat rule. The Program highly recommends that a endangered and threatened species survey be conducted by a qualified professional for both wetland and upland species prior to submitting an application. It was noted during the review of the IP application that the wetland habitat on-site and off-site appears highly suitable for the Barred Owl and the habitat is consistent with known populations.

Development Intensity

As you are well aware, and as stated at the meeting in the August 9, 1993 and in this letter, this office does not give or issue a binding commitment or decision at the pre-application stage. The applicant will be issued a binding decision only when a CAFRA permit is authorized. Moderate Intensity Development allows a maximum of 30 percent coverage however, the project must also comply with all the applicable coastal policies and it is possible that a less intense development may be needed for a project to be in compliance with all the applicable coastal policies.

The guidance given in this letter and the Program's August 9, 1993 letter is only valid until July 19, 1994, at

which time the CAFRA (N.J.S.A. 13:19-1 et seq.) Amendments will take effect. The current Coastal Permit Program Rules (N.J.A.C. 7:7-1 et seq.) and The Rules on Coastal Zone Management (N.J.A.C. 7:7E-1 et seq.) will also be amended to accommodate changes in the Act. If the applicant is planning on having the proposed project reviewed under the current Rules a CAFRA application must be declared "Complete for Final Review" (N.J.A.C. 7:7-4.6) prior to July 19, 1994 or be subject to the new Rules.

At this time the Program has provided the applicant with sufficient guidance for preparing a CAFRA permit application. If you should have should have any questions please contact William Dixon of my staff at the above referenced address or at (609) 296-3521.

Sincerely,

/s/ Mark N. Mauriello
Mark Mauriello,
Supervisor
Ocean County Region

c: Little Egg Harbor Township Planning Board
Little Egg Harbor Township Environmental Commission
Ocean County Planning Board
Marsha Michaels, DAG

BERRY, KAGAN, SAHRADNIK & KOTZAS
A Professional Corporation
212 Hooper Avenue
P. O. Box 757
Toms River, New Jersey 08754
(908) 349-4800
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – OCEAN COUNTY

DARWIN R. GRIFFITH, Plaintiff, vs. STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION (NJDEP); Defendant.	Docket No. OCN-L-2456-95 Civil Action SECOND AMENDED COMPLAINT (INVERSE CONDEMNATION AND OTHER RELIEF) (Filed Oct. 02, 1996)

Plaintiff, Darwin R. Griffith, residing at 11 Lincoln Circle, Chatham, New Jersey, 07928, by way of Complaint against the Defendants, says:

INTRODUCTION

1. Plaintiff is the sole owner of the real property located at Block 78, Lot 33, Little Egg Harbor Township, Ocean County, New Jersey, formerly designated as part of Block 78, Lot 6, and more commonly referred to as "Tall Cedars."

2. Plaintiff first acquired an ownership interest in Tall Cedars as a partner in a joint venture, which purchased the property in or about 1966. The joint venture was formed for the purpose of acquiring and selling land for monetary gain.

3. Plaintiff was awarded the property identified as Tall Cedars as the result of a partition action culminating in an Order of Dissolution dated March 28, 1984 entered by the Superior Court of New Jersey, Chancery Division, Ocean County, New Jersey, Docket No. C-3738-83.

4. Tall Cedars lies along the north side of Nugentown Road and consists of 63 +/- acres; approximately 23 acres of Tall Cedars consist of wetlands. The entire property currently exists in a natural, undeveloped and vacant state.

5. Pursuant to the Township of Little Egg Harbor Land Use Ordinance, Tall Cedars is located in the R-200 (residential) Zone of Little Egg Harbor Township, which provides for a minimum lot size of 20,000 square feet.

6. The 40 upland acres located on Tall Cedars may be legally accessed from Nugentown Road. However, that access requires a permit from the Bureau of Freshwater Wetlands in the State of New Jersey Department of Environmental Protection ("NJDEP") pursuant to the Freshwater Wetlands Protection Act and the rules promulgated thereunder, both of which became effective in 1988.

7. Defendant, NJDEP, is an administrative agency established by the State of New Jersey.

COUNT ONE

1. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 7 of the Introduction to the Complaint and incorporates the same herein as if set forth at length.

2. On or about August 12, 1988, plaintiff submitted to the NJDEP an application for an Individual Freshwater Wetlands Permit and Water Quality Certificate for the purpose of establishing a reasonable access road between Nugentown Road and the 40 acres of the site's developable uplands, through filling approximately .46 acres of wetlands.

3. Without such an access, the subject property is rendered devoid of all viable economic use.

4. Due to the nature and size of the subject property, and its zoning for residential lots with a minimum lot size of 20,000 square feet, the property's only economically viable use is as a major residential subdivision.

5. As reflected in the application, (a) the proposed access road is the only portion of the site which has legal frontage and access on an approved and existing road; (b) without the ability to fill the area in question, the access road could not be constructed and there would be no means of access to the property; (c) the location of the road as outlined in the application would require the least amount of fill necessary to comply with wetlands requirements while meeting road safety standards; (d) the construction of any type of elevated structure for the intended purpose would not be economically feasible; and (e) the applicant, through his attorney, Seymour J.

Kagan, unsuccessfully attempted to gain feasible access through all other adjacent properties by means of purchasing land from the owners thereof.

6. By letter dated December 7, 1988, Plaintiff's application for an individual freshwater wetlands permit was deemed complete with a 180 days review period beginning on October 19, 1988 and ending on the extended date of May 17, 1989.

7. The NJDEP denied Plaintiff's application by letter dated July 19, 1989, (See Exhibit A, attached hereto); in so doing, it exceeded both the statutory 180 day review period (ended on April 17, 1989) and the extension period (to May 17, 1989), which the Plaintiff had granted. Thus the NJDEP did not act on the permit application until 93 days beyond when a decision should have been issued.

8. Significantly, all of Plaintiff's efforts to market the subject property for sale subsequent to the denial of his permit application were unsuccessful.

9. The denial of a freshwater wetlands permit for the purpose of providing an access way to the subject property denied Plaintiff his reasonable and distinct investment-backed expectations by regulating the property into economic inutility and thereby depriving Plaintiff of all economically viable use thereof.

10. Plaintiff's application for a freshwater wetlands permit was denied despite the NJDEP's lack of adequate justification for such action.

11. The NJDEP based its denial of Plaintiff's application upon the following claims:

(a) All alternatives had allegedly not been reasonably exhausted after taking into consideration cost, existing technology and logistics in light of the overall project purposes and environmental consequences;

(b) The NJDEP determined that the wetlands are documented habitat for threatened or endangered species and, therefore, are classified as exceptional resource value wetlands. According to the NJDEP, Plaintiff had allegedly failed to demonstrate compliance with the provisions of N.J.A.C. 7:7A-3.3 for non-water dependent activities in freshwater wetlands of exceptional resource value; and

(c) Plaintiff had allegedly failed to demonstrate that an access road to undeveloped uplands is a public need and that denial of the project would result in an extraordinary hardship.

12. The aforesaid claims were self-serving and meritless.

13. As such, on or about August 16, 1989, Plaintiff requested that an administrative hearing be held with regard to the NJDEP's denial of his application.

14. During the administrative review process, the NJDEP engaged in a course of conduct constituting bad faith; it caused unwarranted delay and adopted invalid positions that ultimately were recanted only after considerable time and expense had been incurred by Plaintiff. Moreover, these recantations were made immediately prior to when the OAL was to render decisions on the issues. The tardiness of the initial permit denial, the interim invalid negative positions adopted, and the questionable need for the NJDEP to have received numerous

time extensions during the appeal process, all evidence that the NJDEP has caused extraordinary delay in the review of this matter.

15. In July, 1990, Plaintiff and Defendant, NJDEP, filed Cross Motions for Summary Decision before the OAL. The issues presented were to determine whether Plaintiff had a duty to initiate a quiet title action for a disputed portion of the Tall Cedars parcel and to determine whether a "practicable alternative" existed to Plaintiff's proposed access road from Nugentown Road.

16. In its July 5, 1990 brief, the NJDEP strenuously and irrationally argued that Plaintiff had a duty to initiate such a quiet title action as a condition to the granting of a freshwater wetlands permit.

17. In her August 2, 1990 decision, (OAL Docket No. ESA 9585-89), Administrative Law Judge (ALJ) M. Kathleen Duncan granted the NJDEP's Motion for Summary Decision and denied Plaintiff's Motion. ALJ Duncan determined that Plaintiff was required to initiate a quiet title action.

18. By Final Decision dated November 5, 1990, then Commissioner (and former Superior Court judge) Judith Yaskin reversed ALJ Duncan's Initial Decision and remanded the matter to the OAL for further proceedings.

19. Significantly, just prior to the scheduled OAL hearing, the NJDEP advised the court that it had decided to accept Plaintiff's assertion that Nugentown Road constituted the only practicable access to Plaintiff's property.

20. By Initial Decision dated August 5, 1991, (OAL Docket No. ESA 910-91), ALJ Duncan acknowledged the

NJDEP's revised position and determined that the remaining issues were beyond the jurisdiction of the OAL (specifically, the width of the proposed road access). Therefore, the matter was dismissed as being moot.

21. Nevertheless, the NJDEP's reversal of its unreasonable position occurred only after Plaintiff had incurred substantial expenditures of time and monies in defending against same.

22. Ultimately, the NJDEP also changed its position with regard to the classification of the wetlands adjacent to Plaintiff's proposed road access.

23. Subsequent to the issuance of ALJ Duncan's Initial Decision on August 5, 1991 (OAL Docket No. ESA 910-91), NJDEP Commissioner Weiner then remanded the matter to the OAL for a determination of (1) whether the project site was appropriately classified as exceptional resource value wetlands and (2) if it was, whether the application satisfied the criteria of N.J.A.C. 7:7A-3.3.

24. The NJDEP's July 18, 1989 Staff Summary Report which accompanied the permit denial had classified all on site wetlands at the subject property as exceptional resource value wetlands.

25. Nevertheless, the aforesaid classification was made despite the lack of any meaningful documentation confirming the presence of endangered or threatened species on the subject property.

26. On or about February 7, 1992, and shortly before the scheduled OAL hearing, the NJDEP reclassified the wetlands located adjacent to the proposed access road as intermediate resource value wetlands.

27. By ALJ Duncan's Consent Order dated March 16, 1992, (OAL Docket No. ESA 204-92), the NJDEP was required to reclassify the wetlands located at the project site from exceptional resource value to intermediate resource value wetlands and to issue an Individual Freshwater Wetlands Permit with appropriate conditions, reserving Plaintiff's right to appeal from the conditions.

28. A Decision Approving Settlement was also entered on said date, constituting a final decision pursuant to N.J.A.C. 1:1-19.1(b)2.

29. Eventually, on or about June 25, 1992, the NJDEP issued the Plaintiff a Freshwater Wetlands Permit and Water Quality Certificate. (See Exhibit B, attached hereto.) Clearly, said permit contained such unreasonable conditions as to render the value of the permit economically worthless.

30. Defendant NJDEP's belated issuance of the requested permit further demonstrates its unreasonable and unjustified action in initially denying same in July, 1989.

31. The NJDEP and its employees, officials, representatives and agents have consciously, willfully, improperly, intentionally, maliciously, unjustifiably and in bad faith denied Plaintiff's application for a freshwater wetlands permit; thus effectuating a regulatory taking of this property without just compensation and denying the Plaintiff's federal and state constitutional rights.

32. Actions taken by the NJDEP and its employees, officials, representatives and agents (a) denied Plaintiff's application for a freshwater wetlands permit and thus

precluded all economically viable use of the subject property; (b) asserted unjustifiable and unreasonable positions which were later reversed only after Plaintiff had incurred substantial time and expense and (c) caused extraordinary delays during the entire review processes; these acts have constituted a taking of Plaintiff's property without just compensation and violated Plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

33. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, violated Plaintiff's rights to procedural due process, substantive due process and equal protection afforded him under the Fifth and Fourteenth Amendments to the United States Constitution.

34. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, constituted a taking of Plaintiff's property without just compensation pursuant to N.J.S.A. 13:9B-22 and violated Plaintiff's rights under Article I, Paragraph 20 of the New Jersey Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendant, NJDEP, for:

A. A declaration that the actions of the NJDEP have caused a taking of Plaintiff's property without just compensation for the period July 19, 1989 to June 25, 1992 and that the actions violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution, violated his substantive and procedural due process and equal protection rights thereunder and violated his

rights under Article I, Paragraph 20 of the New Jersey Constitution;

B. An Order compelling Defendant, NJDEP, to condemn the subject property pursuant to N.J.S.A. 13:9B-22(b) and the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq., or, alternatively, an Order compelling the NJDEP to pay Plaintiff his compensatory damages resulting from the unlawful taking of the subject property from July 19, 1898 to June 25, 1992, together with interest, and compelling the NJDEP to issue Plaintiff a reasonably conditioned Freshwater Wetlands Permit forthwith;

C. Punitive damages;

D. Attorney's fees and costs of suit herein;

E. Attorney's fees and costs of suit incurred in the related state administrative and state judicial proceedings concerning the subject matter of this Complaint; and

F. Such further relief as this Court deems just and equitable.

COUNT TWO

1. Plaintiff repeats and realleges each and every allegation contained in the Introduction and Count One of the Complaint and incorporates the same herein as if set forth at length.

2. The Freshwater Wetlands Permit issued to Plaintiff by the NJDEP on or about June 25, 1992 contained conditions that were so restricting and unreasonable that

effectively, the Plaintiff continued to be denied all viable economic uses of his property.

3. On or about July 15, 1992, and in Plaintiff's behalf, Seymour J. Kagan, Esquire, made a written request to the NJDEP's Office of Legal Affairs for a formal hearing regarding certain conditions contained in the Permit.

4. The unreasonable conditions set forth in the Permit to which Plaintiff objected included, but were not limited to the following:

(a) The Permit condition which restricted the proposed access road to a 16 foot cartway width; notwithstanding, that the property's only viable economic use was as a major subdivision and that the Township of Little Egg Harbor Land Use Ordinance required a minimum cartway width of 30 feet for major subdivision roadways. Furthermore, the 16 foot cartway width both practically and legally prohibited two way traffic; thereby, effectively limiting the use of a 40 acre upland tract to a single homesite;

(b) The NJDEP's unjustified requirement that Plaintiff apply for a major modification of the Permit in order to obtain approval for a wider access road at some future date; and

(c) The NJDEP's arbitrary requirement that Plaintiff relocate the proposed access road to position the toe of slope along the property line of adjacent Lots 28 and 29; notwithstanding, that this condition conflicted with the

Township of Little Egg Harbor Land Use Ordinance provisions governing sight triangles and permissible angles for intersecting streets in a subdivision.

5. The NJDEP's penchant for adopting invalid positions and its unjustified delays, precedent to the Permit issued on June 25, 1992, demonstrates the NJDEP's bad faith and unrelenting intent to deprive Plaintiff of his constitutional rights.

6. In April of 1993, Plaintiff and the NJDEP submitted Cross-Motions for Summary Decision before ALJ Ronald I. Parker.

7. On June 23, 1993, ALJ Parker issued an Order Denying Motions for Summary Decision (OAL Docket No. EWR 8375-92) because he found that the NJDEP's relocation of the access road was a material fact issue that required an evidentiary hearing; namely, to resolve whether constructing an access road pursuant to the permit requirements mandated a taking of real property (in which Plaintiff had no interest) in order to comply with the sight triangle requirements of the local ordinances.

8. Significantly, it was not until January 12, 1994 that the NJDEP agreed (by William Dixon's affidavit) to adjust the location of the 16 foot wide access road; this affidavit acknowledged the need for minimal site triangles as required by Little Egg Harbor Township, and thereby eliminated a possible taking of an adjoining owner's property.

9. By this adjustment of the access road, the NJDEP merely acquiesced to the access road location that Plaintiff had always proposed.

10. Thus, the NJDEP needlessly delayed the administrative review process and subjected Plaintiff to additional unwarranted expenditures of time and money.

11. On February 2, 1994, Judge Parker rendered an Initial Decision (OAL Docket No. EWR 8375-92) denying Plaintiff's Cross-Motion for Summary Decision and granting Defendant NJDEP's Motion for Summary Decision.

12. After having been granted three Orders of Extension, NJDEP Commissioner Robert C. Shinn, Jr rendered a Final Decision on May 25, 1995(4) that, in part, agreed with Judge Parker's decision of February 2, 1994.

13. The Commissioner adopted Judge Parker's conclusion affirming the NJDEP's restriction of the access road width to 16 feet.

14. The Commissioner also directed that certain revisions be made to the Permit, including a modification whereby the Plaintiff might currently seek and if approved (under the substantive criteria of the Freshwater Wetlands Protection Act), receive a major modification of the Permit regarding the access road width.

15. Nevertheless, any Permit which restricts the access road to a 16 foot cartway and concurrently fails to include a reasonable provision for a greater width only operates to deprive Plaintiff of all economically viable use of his property. The 40 acres of upland area is zoned for and can support a significant number of 20,000 square foot lots; however, this property is not realistically marketable as long as any potential purchaser has reason to question whether a suitable permit can be obtained from

the NJDEP within a reasonable time frame and in these two respects the NJDEP's record has been more than dismal.

16. On or about July 15, 1994, Plaintiff filed a Notice of Appeal which objected to the following portions of the Commissioner's decision:

(a) the adoption of the ALJ's conclusion regarding the maximum width of the access road, i.e., 16 feet;

(b) the requirement that Plaintiff apply for a major modification of the Permit to gain a wider access road;

(c) the Commissioner's determination that the access road relocation issue was rendered moot by the NJDEP's agreement to adjust said access to comply with local sight triangle requirements; and

(d) the determination that the Permit's expiration date should be June 25, 1997.

17. The NJDEP's insistence that the Permits respective issue and expiration dates of June 25, 1992 and June 25, 1997 must be adhered to is unreasonable due to (a) the effect of an ongoing litigation that was and continues to be fomented by the NJDEP's efforts to unconscionably reduce the Permit's effective period and (b) the NJDEP's much belated consideration of the Plaintiff's proposed on site mitigation plan. A mitigation approval is also a condition precedent to the effectiveness of the Permit; it was not until November 1993 that the NJDEP saw fit to advise Plaintiff that his long proposed on site mitigation plan (first submitted in August, 1988) was considered to be unacceptable.

18. Moreover, the NJDEP's pattern of dilatory tactics and imposition of overly restrictive conditions regarding the Plaintiff's Freshwater Wetlands Permit has continued from June 25, 1992 to date and thereby, Plaintiff has been denied his constitutional, statutory and regulatory rights; these conscious NJDEP decisions have frustrated any and all development of the subject property and have resulted in denying Plaintiff all viable economic use thereof.

19. The NJDEP and its employees, officials, representatives and agents have consciously, willfully, improperly, intentionally, maliciously, unjustifiably and in bad faith imposed unreasonable and unauthorized conditions upon Plaintiff's Freshwater Wetlands Permit; thus, Plaintiff has been denied his federal and state constitutional rights by the perpetuation of an unlawful taking of this property without just compensation.

20. Actions taken by the NJDEP and its employees, officials, representatives and agents have (a) imposed unreasonable and unduly onerous conditions upon Plaintiff's Freshwater Wetlands Permit, and thereby denied all economically viable use of the subject property; (b) asserted unjustifiable and unreasonable positions which were later reversed only after Plaintiff had incurred substantial time and expense and (c) caused extraordinary delays during the entire review process; these acts have constituted a taking of Plaintiff's property without just compensation and violated Plaintiff's rights under the Fifth and Fourteenth amendments to the United States Constitution.

21. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, violated Plaintiff's rights to procedural due process, substantive due process and equal protection afforded him under the Fifth and Fourteenth Amendments to the United States Constitution.

22. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, constituted a taking of Plaintiff's property without just compensation pursuant to N.J.S.A. 13:9B-22 and violated Plaintiff's rights under Article I, Paragraph 20 of the New Jersey Constitution.

WHEREFORE, Plaintiff demands judgment against Defendant; NJDEP, for:

A. A declaration that the actions of the NJDEP have caused a taking of Plaintiff's property without just compensation from June 25, 1992 to the present date and violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution, violated his substantive and procedural due process and equal protection rights thereunder and violated his rights under Article I, Paragraph 20 of the New Jersey Constitution;

B. An Order compelling Defendant, NJDEP, to condemn the subject property pursuant to N.J.S.A. 13:9B-22(b) and the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq., or, alternatively, an Order compelling the NJDEP to pay Plaintiff his compensatory damages resulting from the unlawful taking of the subject property from June 25, 1992 until such time as the

NJDEP issues Plaintiff a reasonably conditioned Freshwater Wetlands Permit, together with interest, and compelling the NJDEP to issue Plaintiff a reasonably conditioned Freshwater Wetlands Permit forthwith;

C. Punitive damages;

D. Attorney's fees and costs of suit herein;

E. Attorney's fees and costs of suit incurred in the related state administrative and state judicial proceedings concerning the subject matter of this Complaint; and

F. Such further relief as this Court deems just and equitable.

COUNT THREE

1. Plaintiff repeats and realleges each and every allegation contained in the Introduction and Counts One and Two of the Complaint and incorporates the same herein as if set forth at length.

2. By letter dated March 17, 1993, R. Bradley Tombs of Normandeau Associates, Inc., Plaintiff's environmental consultant, requested that Mark Mauriello of the NJDEP's Land Use Regulation Element, schedule a pre-application conference pursuant to N.J.A.C. 7:7-3.2 with regard to Plaintiff's forthcoming application for a Coastal Area Facility review Act (CAFRA) permit and other required permit applications.

3. Thereafter, Mr. Tombs forwarded to the NJDEP an "in progress" site plan titled "Plan for Proposed Major Subdivision, Block 78, Lot 33, Little Egg Harbor Township.

4. A pre-application conference took place on June 22, 1993, at which time the following were present: Plaintiff, Mr. Tombs, James F. Stanton (Plaintiff's engineering consultant), Mark Mauriello and William T. Dixon (Principal Environmental Specialist, Bureau of Coastal Regulation, NJDEP).

5. On or about November 15, 1993, Mr. Tombs forwarded to the NJDEP an application for a CAFRA Permit for the subject property.

6. The CAFRA application was submitted primarily to refute the NJDEP's ongoing and unjustified argument that such development specific were required before the width of Plaintiff's proposed wetlands road access for his tract of 40 +/- upland acres could be reasonably determined and secondarily to further promote the sale of the Tall Cedars property at fair market value.

7. The proposed project provides for a major subdivision of the property into 44 lots for single family residences.

8. On April 15, 1994, a public hearing was held with regard to Plaintiff's application for a CAFRA permit. The NJDEP's Staff Preliminary Analysis, however, was not provided to Plaintiff until the day of the public hearing.

9. Significantly, the Preliminary Analysis Summary prepared by the NJDEP states: "Based on the analysis which follows, it appears that the Administration may, depending on the information submitted, redesign modifications made and if the sewer service area is amended to include this site, be able to find that the project is in compliance with the Rules on Coastal Resources and

Development N.J.A.C. 7:7E-1.1 et seq. as amended April 5, 1993."

10. On July 15, 1994, Mr. Tombs submitted to the NJDEP an exhaustive response to the Staff Preliminary Analysis relative to the CAFRA appeal.

11. The NJDEP, however, unjustifiably found Mr. Tombs' submittal to be deficient.

12. On or about July 29, 1994, Mr. Dixon requested that additional information be provided with regard to the following issues in connection with the CAFRA application: steep slopes, secondary impacts, stormwater runoff, vegetation and buffers and compatibility of uses.

13. By letter dated August 9, 1994, Mr. Dixon advised Mr. Tombs that the Tall Cedars CAFRA permit application would be subject to the Rules on Coastal Zone Management (N.J.A.C. 7:7E) as amended July 18, 1994 as it had not yet been declared complete for final review.

14. On August 30, 1994, Mr. Tombs responded to Mr. Dixon's July 29, 1994 and August 9, 1994 letters. Mr. Tombs' letter addressed the issues raised in Mr. Dixon's July 29, 1994 letter with regard to steep slopes, secondary impacts, stormwater runoff, vegetation and buffers and compatibility of uses. The letter also objected to the NJDEP's determination that the Rules on Coastal Zone Management as amended July 18, 1994 would apply to the CAFRA application.

15. By letter dated August 30, 1994, James F. Stanton forwarded to Mr. Dixon extensive commentary concerning the issues of secondary impact and stormwater runoff relative to the proposed project.

16. Mr. Dixon replied to these letters on September 20, 1994, claiming that the application remained deficient in the following areas: steep slopes, secondary impacts, stormwater runoff and vegetation. The letter further provided that, if the necessary information was not received within thirty days, the application would be canceled. This NJDEP position was entirely unwarranted since Plaintiff's consultants had previously expended significant effort in attempting to provide more than sufficient data for enabling the NJDEP to make a well-informed CAFRA decision in this matter.

17. On September 23, 1994, R. Bradley Tombs and Seymour J. Kagan, Esquire objected to the NJDEP's interpretation of the Rules on Coastal Zone Management and requested that the NJDEP either issue Plaintiff a CAFRA permit or deny the application.

18. By letter dated December 2, 1994, Ruth Ehinger, Manager of the NJDEP's Bureau of Coastal Regulation, informed Mr. Tombs that the application for the CAFRA permit had been canceled and that any new application must comply with the Rules on Coastal Zone Management (N.J.A.C. 7:7E-1.1 et seq.) as amended July 18, 1994. (See Exhibit C, attached hereto)

19. By letter dated January 9, 1995, Seymour J. Kagan, Esquire, requested NJDEP Commissioner Shinn, or his Assistant Commissioner for Land Use Regulation, to conduct an internal review of the NJDEP's processing of this CAFRA application.

20. The aforesaid letter further requested a reversal of the NJDEP's decision to cancel the application, a determination that the application was complete for review

and that it be reviewed under the Rules on Coastal Zone Management in existence prior to July 18, 1994 since all reasonably required information had been received by the NJDEP prior to the effective date of the new Rules.

21. The January 9, 1995 letter alternatively requested that, in the event Commissioner Shinn concluded that the NJDEP properly canceled the application, he should render an opinion in the form of a final decision to enable Plaintiff to appeal therefrom.

22. The aforesaid letter further indicated that, should the Commissioner deny both requests, the letter would serve as a request to the NJDEP Office of Legal Affairs for an adjudicatory hearing with respect to the cancellation of the CAFRA permit application.

23. On January 30, 1995, Plaintiff filed a Notice of Appeal (now Superior Court Appellate Division Docket No. A-2667-94T5) from the NJDEP's cancellation of his application for a CAFRA permit.

24. On February 6, 1995, the OAL granted Plaintiff's request for an adjudicatory hearing (OAL Docket No. ESA 1867-95). The matter was subsequently withdrawn from the OAL without prejudice, pending a decision by the Superior Court, Appellate Division.

25. On February 6, 1995, a meeting was also held at the NJDEP's offices during which Plaintiff, Mr. Kagan, Mr. Tombs, Mr. Stanton, Assistant Commissioner Cowan, Ruth Ehinger, William T. Dixon, Ernest P. Hahn, Administrator of the NJDEP Land Use Regulation Program, and Daniel J. Van Abs, Ph.D., Assistant Administrator of the

NJDEP Office of Land and Water Planning, discussed the CAFRA permit application.

26. On or about February 24, 1995, Mr. Hahn advised Mr. Kagan that "the Program was timely in its responses and the information requested was necessary to declare the application complete for review."

27. Mr. Hahn's letter also stated that the NJDEP had decided not to grant the Plaintiff's request that any new application be reviewed under the Rules on Coastal Zone Management which preceded the July 18, 1994 amendment. Therefore, according to Mr. Hahn, any new application would be reviewed under the revised Rules.

28. Despite Mr. Hahn's assertions, the NJDEP has repeatedly failed to provide timely responses to Plaintiff's inquiries regarding this CAFRA application. Furthermore, Plaintiff has provided the NJDEP with voluminous and comprehensive materials and documents that contained more than adequate information for an NJDEP finding that the application was complete for review under the Rules on Coastal Zone Management prior to the July 18, 1994 amendment.

29. The Rules on Coastal Zone Management as amended and effective on July 18, 1994, provide a revised definition of the environmental sensitivity rating for the subject property.

30. The revised criteria for determining the environmental sensitivity rating produces a severe impact on the Plaintiff's proposed project; the allowable density would be so extremely limited that this property would become devoid of all viable economic value.

31. Applying the revised Rules on Coastal Zone Management to the project reduces the previously acknowledged moderate development intensity (allowing 30 percent site coverage and 44 units, with on-site mitigation), to a low development intensity (allowing only a 3 percent maximum coverage).

32. Thus, considering the nature and size of the subject property, the application of the revised Rules to Plaintiff's proposed project precludes the development of the project consistent with its only economically viable use (i.e., a major subdivision), and clearly deprives Plaintiff of all economically viable use of his property.

33. The NJDEP's decision, to cancel the Plaintiff's CAFRA application and apply the amended Rules to any new application filed for this project, is unconscionable. The NJDEP's dilatory tactics in failing to provide timely responses to the inquiries made on the Plaintiff's behalf have caused extraordinary delay in the permit review process, and clearly reflect its bad faith in processing this CAFRA application.

34. These NJDEP actions have denied Plaintiff his constitutional, statutory and regulatory rights; these conscious NJDEP decisions have frustrated any and all development of the subject property and have resulted in denying Plaintiff all viable economic use thereof.

35. The NJDEP and its employees, officials, representatives and agents have consciously, willfully, improperly, intentionally, maliciously, unjustifiably and in bad faith canceled Plaintiff's CAFRA application and have determined that any new application must be reviewed under the revised Rules on Coastal Zone Management;

thus, Plaintiff has been denied his federal and state Constitutional rights by the perpetuation of an unlawful taking of his property without just compensation.

36. Actions taken by the NJDEP and its employees, officials, representatives and agents have (a) canceled Plaintiff's CAFRA application, (b) determined that any new application must be reviewed under the revised Rules on Coastal Zone Management, thereby denying all economically viable use of the subject property, and (c) caused extraordinary delays during the entire review process; these acts have constituted a taking of Plaintiff's property without just compensation and violated Plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

37. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, violated Plaintiff's rights to procedural due process, substantive due process and equal protection afforded him under the Fifth and Fourteenth Amendments to the United States Constitution.

38. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, constituted a taking of Plaintiff's property without just compensation pursuant to N.J.S.A. 13:9B-22 and violated Plaintiff's rights under Article I, Paragraph 20 of the New Jersey Constitution.

WHEREFORE, Plaintiff demands judgment against Defendant, NJDEP, for:

A. A declaration that the actions of the NJDEP have caused a taking of Plaintiff's property without just compensation from December 2, 1994 to the present date and violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution, violated his substantive and procedural due process and equal protection rights thereunder, and violated his rights under Article I, Paragraph 20 of the New Jersey Constitution;

B. An Order compelling Defendant, NJDEP, to condemn the subject property pursuant to the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq., or, alternatively, an Order compelling the NJDEP to (1) deem Plaintiff's application for a CAFRA permit complete under the Rules on Coastal Zone Management prior to the July 18, 1994 amendment thereto, (2) pay Plaintiff his compensatory damages resulting from the unlawful taking of the subject property from December 2, 1994 until such time as the NJDEP issues Plaintiff his requested CAFRA permit, together with interest, and (3) issue Plaintiff his requested CAFRA Permit pursuant to the Rules on Coastal Zone Management prior to the July 18, 1994 amendment thereto;

C. Punitive damages;

D. Attorney's fees and costs of suit herein;

E. Attorney's fees and costs of suit incurred in the related state administrative and state judicial proceedings concerning the subject matter of this Complaint; and

F. Such further relief as this Court deems just and equitable.

COUNT FOUR

1. Plaintiff repeats and realleges each and every allegation contained in the Introduction and Counts One, Two and Three of the Complaint and incorporates the same herein as if set forth at length.

2. On December 14, 1993, the Little Egg Harbor Township Municipal Utilities Authority (LEHTMUA) granted Plaintiff preliminary approval for a comprehensive sanitary sewer collection system to serve the proposed project.

3. On or about January 26, 1994, on Plaintiff's behalf, James F. Stanton forwarded to the NJDEP, Office of Land and Water Planning, documentation supporting a request for an amendment to the Ocean County Water Quality Management Plan. (208 Amendment)

4. The proposed sewer system was to include on-site gravity collection, a sewage pump station and a force main.

5. The existing 208 Water Quality Management Plan sewer service area already includes a small section of the subject property along the southern boundary of the project.

6. The installation of an on-site collection system and connection to an existing municipal service is both the most economical and environmentally protective means of sewering this proposed project.

7. The use of on-site individual septic systems would not be a viable option for the proposed 44 units because malfunctioning septic systems are more prone to

causing adverse environmental impacts than would an approved sewer collection system.

8. In a December 6, 1993 letter to Mr. Stanton, Alan W. Avery, Jr., then Assistant Planning Director for Ocean County, indicated that the County would support incorporating in the designated sewer service area that portion of this project which was not already included therein.

9. On or about May 3, 1994, Daniel J. Van Abs, Ph.D., Assistant Administrator of the NJDEP Office of Land and Water Planning, advised Mr. Stanton that the proposed amendment would be disapproved for several reasons. (See Exhibit D, attached hereto.)

10. According to Dr. Van Abs' letter, the proposed project site lies within a limited growth region, and a proposed amendment to the Water Quality Management Plan on relatively undisturbed sites is discouraged if sewer service would allow for a higher development on site than what would occur if development were limited to individual subsurface sewerage disposal systems.

11. Dr. Van Abs' letter further stated that a portion of the property in question lies within the Pinelands National Reserve Rural Development Area and "should not be designated as a sewer service area as sewer service would only be permitted in this designation to correct an existing public health hazard."

12. Another reason given for the disapproval of the proposed amendment was that, in the State Development and Redevelopment Plan, the project is located in an area designated as an "Environmentally Sensitive Planning Area," which encourages limited growth.

13. Dr. Van Abs further claimed that the LEHTMUA collection system was build with grant monies and is subject to wetlands grant condition restrictions that require a waiver or a mapping revision approval before the area is added to the sewer service area and before connecting any new sewage generating structure to the LEHTMUA collection system.

14. Finally, according to Dr. Van Abs, an environmental assessment consistent with N.J.A.C. 7:14A0-10.4 for the proposed site would be necessary as a result of the proposed expansion of the existing sewer service area.

15. Plaintiff's environmental and engineering consultants respectively responded to Dr. Van Abs' May 3, 1994 letter by correspondence dated May 16, 1994 and May 18, 1994.

16. Further, on May 18, 1994, James Stanton submitted to the NJDEP's Municipal Wastewater Assistance Program relevant documentation in support of a request for a mapping revision approval.

17. Thereafter, Mr. Tombs submitted additional letters to the NJDEP in further support of Plaintiff's position that the proposed 208 Amendment should be approved.

18. On August 2, 1994, the requested mapping revision was approved.

19. By letters dated August 31, 1994 and November 28, 1994, James Stanton advised Dr. Van Abs that sufficient data had been submitted to allow the granting of the requested amendment and that the application had been unduly delayed due to the Land Use Regulation

Element's failure to provide timely responses to inquiries from the Office of Land and Water Planning.

20. By letter dated January 6, 1995, Dr. Van Abs advised Mr. Stanton that the proposed amendment had been disapproved for those reasons set forth in his May 3, 1994 letter and because "until such time as a CAFRA Permit becomes a possibility for the proposed Tall Cedars project, the Office of Land and Water Planning must continue to disapprove a proposed amendment for the site." (See Exhibit E, attached hereto.) This latter statement clearly demonstrates how the NJDEP subjects an applicant to interminable delay by allowing its different permitting groups to adopt attitudes that embrace "which comes first, the chicken or the egg" policies. In turn, the CAFRA regulatory group has refused to issue a permit unless a 208 Amendment is first procured and thus a "catch 22" situation has resulted.

21. On or about March 4, 1995, Dr. Van Abs issued another decision relative to the requested amendment to the Water Quality Management Plan, which superseded his January 6, 1995 letter. (See Exhibit F, attached hereto.)

22. The March 4, 1995 letter declared the proposed amendment to be inconsistent with the Rules on Coastal Zone Management and with policies governing the Pinelands Comprehensive Management Plan; thus a denial of the amendment request was mandated.

23. On January 30, 1995, Plaintiff filed a Notice of Appeal (now Superior Court Appellate Division Docket No. A-2667-94T5) from the NJDEP's disapproval of his application for an amendment to the Ocean County Water Quality Management Plan.

24. As there exist no other viable alternatives to the proposed sewer service system for the development of the project, the disapproval of the requested 208 Amendment precludes any development of this property that is consistent with its only economically viable use (i.e., a major subdivision); thus, the Plaintiff has been denied all economically viable use of his property.

25. The NJDEP's unjustified denial of Plaintiff's requested 208 Amendment and its dilatory tactics during the permit review process have caused extraordinary delay and clearly reflect its bad faith in processing this 208 Amendment.

26. These NJDEP actions have denied Plaintiff his constitutional, statutory and regulatory rights; these conscious NJDEP decisions have frustrated any and all development of the property and have resulted in denying Plaintiff all viable economic use thereof.

27. The NJDEP and its employees, officials, representatives and agents have consciously, willfully, improperly, intentionally, maliciously, unjustifiably and in bad faith disapproved Plaintiff's requested 208 Amendment; thus, Plaintiff has been denied his federal and state Constitutional rights by the perpetuation of the unlawful taking of his property without just compensation.

28. Actions taken by the NJDEP and its employees, officials, agents and representatives have (a) disapproved Plaintiff's requested 208 Amendment, thereby denying all economically viable use of the subject property, and (b) caused extraordinary delay during the permit review process; these acts have constituted a taking of Plaintiff's

property without just compensation and violated Plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

29. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, violated Plaintiff's rights to procedural due process, substantive due process and equal protection afforded him under the Fifth and Fourteenth Amendments to the United States Constitution.

30. The aforesaid actions, taken by the NJDEP and its employees, officials, representatives and agents, constituted a taking of Plaintiff's property without just compensation pursuant to N.J.S.A. 13:9B-22 and violated Plaintiff's rights under Article I, Paragraph 20 of the New Jersey Constitution.

WHEREFORE, Plaintiff demands judgment against Defendant, NJDEP, for:

A. A declaration that the actions of the NJDEP have caused a taking of Plaintiff's property without just compensation from January 6, 1995 to the present date and violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution, violated his substantive and procedural due process and equal protection rights thereunder, and violated his rights under Article I, Paragraph 20 of the New Jersey Constitution;

B. An Order compelling Defendant, NJDEP, to condemn the subject property pursuant to the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq., or, alternatively, an order compelling the NJDEP to pay

Plaintiff his compensatory damages resulting from the unlawful taking of the subject property from January 6, 1995 until such time as the NJDEP approve Plaintiff's proposed amendment to the Ocean County Water Quality Management Plan, together with interest, and compelling the NJDEP to approve Plaintiff's proposed amendment to the Ocean County Water Quality management Plan;

C. Punitive damages;

D. Attorney's fees and costs of suit herein;

E. Attorney's fees and costs of suit incurred in the related state administrative and state judicial proceedings concerning the subject matter of this Complaint; and

F. Such further relief as this Court deems just and equitable.

COUNT FIVE

1. Plaintiff repeats and realleges each and every allegation contained in Counts One through Four of the Amended Complaint and incorporates the same herein as if set forth at length.

2. On May 24, 1996, the Appellate Division affirmed the NJDEP's decision to cancel Plaintiff's CAFRA permit application and to disapprove Plaintiff's Water Quality Management Plan Amendment (WQM) application; the finding in the CAFRA matter was predicated upon deferring to the NJDEP's presumed professional expertise and in the WQM matter, was based upon the Plaintiff not having exhausted his administrative remedy. The Appellate Court neither addressed the possibility that granting such deference might be misplaced nor based upon the

record, did it perceive that the administrative process could prove futile or at least unduly burdensome. The Plaintiff had contended that, by mid-July 1994, the NJDEP had received more than adequate information and documentation to have made well informed environmental decisions in both matters.

3. As a result of this decision, Plaintiff now would have to comply with the Rules on Coastal Zone Management, as amended, effective July 18, 1994. However, under these amended Rules, the Plaintiff would be economically precluded from further pursuing CAFRA approval for a proposed residential subdivision of forty-four half-acre lots at this site.

4. Prior to July 18, 1994, the NJDEP Rules on Coastal Zone Management had allowed Plaintiff's property to be approved for a forty-four lot residential subdivision and such had been sought in Plaintiff's CAFRA application of November, 1993. Said application proposed a development that complied with Little Egg Harbor Township's long-standing R-200 zoning (20,000 square feet minimum lot size) and that zoning still applies to this site.

5. The Rules on Coastal Zone Management as amended and effective on July 18, 1994, revised N.J.A.C. 7:7E-5.3 through N.J.A.C. 7:7E-5.7, and under N.J.A.C. 7:7E-5.4(b)2., included a modification to the definition of the environmental sensitivity rating.

6. The amended criteria, from which the NJDEP determines a level of "acceptable development intensity", severely and adversely impacts the Plaintiff's proposed project. Since July 18, 1994, Plaintiff's property became

subject to a three percent maximum coverage for structures and impervious paving; thereunder, the NJDEP would sanction the creation of only about three to five half-acre lots on forty total acres of developable uplands.

7. Furthermore, the amended Rules on Coastal Zone Management alternatively also restricted the Plaintiff's property to an economically infeasible twenty-four lot subdivision and thereby functioned to supersede the forty-four lot density permitted under the assigned local zoning. Inarguably, if Plaintiff were to seek subdivision approval for more than twenty-four lots, the CAFRA twenty-five lot regulatory threshold would be triggered and the property then would be restricted to about one acre of "acceptable development intensity"; thus limiting the site development to the aforesaid three to five lots of half-acre size.

8. Thus, based on the nature and size of the subject property, the application of the revised Rules to Plaintiff's proposed project precludes the development of the project consistent with its only economically viable use (i.e., a major subdivision), and clearly deprives Plaintiff of all economically viable use of his property whether the ultimate development allowed were to be three to five lots or twenty-four lots has no import since in either event the Plaintiff's interest would be subjected to a taking. Therefore, the amended rules are unconstitutional as applied to Plaintiff.

9. Moreover, the July 1994 amendments to the Rules on Coastal Zone Management are unauthorized and unconstitutional as they constitute an abuse of the

NJDEP's statutory authority by imposing an extreme economic burden upon a relatively few property owners within the CAFRA domain, resulting in discrimination.

10. Based upon the foregoing, the NJDEP's Rules on Coastal Zone Management, as amended effective July 1994, the decision of the Superior Court of New Jersey, Appellate Division, upholding the NJDEP's decision that Plaintiff's 1993 CAFRA application became subject to these amended Rules, and the punitive limitations now imposed by exceeding the twenty-four lot CAFRA regulatory threshold all serve to sustain a continuing act of inverse condemnation that began with the NJDEP's denial of a Freshwater Wetlands Permit on July 19, 1989 and for which Plaintiff must be granted compensation.

WHEREFORE, Plaintiff demands judgment against Defendant, NJDEP, for:

A. A declaration that the NJDEP's adoption of the CAFRA amendments effective July 18, 1994 has continued the taking of Plaintiff's property without just compensation that began with the NJDEP's denial of a Freshwater Wetlands Permit on July 19, 1989 and thereby violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution, violated his substantive and procedural due process and equal protection rights thereunder, and violated his rights under Article I, Paragraph 20 of the New Jersey Constitution;

B. A declaration that the revised Rules on Coastal Zone Management are unconstitutional as applied to Plaintiff;

C. An Order compelling Defendant, NJDEP, to condemn the subject property pursuant to the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq., or, alternatively, an Order compelling the NJDEP to (1) deem Plaintiff's application for a CAFRA Permit complete under the Rules on Coastal Zone Management prior to the July 18, 1994 amendment thereto, (2) deem Plaintiff's application for a WQM Plan Amendment complete under the Water Quality Management Planning Rules, N.J.A.C. 7:15-1.1 et seq., (3) pay Plaintiff his compensatory damages resulting from the unlawful taking of the subject property from July 18, 1994 until such time as the NJDEP issues Plaintiff his requested CAFRA Permit and WQM Plan Amendment, together with interest, and (4) issue Plaintiff his requested CAFRA Permit pursuant to the rules on Coastal Zone Management prior to the July 18, 1994 amendment thereto and (5) approve Plaintiff's requested WQM Plan Amendment pursuant to the Water Quality Management Planning Rules;

D. Attorney's fees and costs of suit incurred in the related state administrative and state judicial proceedings concerning the subject matter of this Second Amended Complaint; and

E. Attorney's fees and costs of suit herein;

F. Punitive damages;

G. Such further relief as this Court deems just and equitable.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues.

RESERVATION OF RIGHTS

Plaintiff hereby reserves the right to litigate his constitutional claims in a federal court 42 U.S.C. §1983 action.

BERRY, KAGAN, SAHRADNIK & KOTZAS
A Professional Corporation
Attorneys for Plaintiff

By: /s/ Seymour J. Kagan
SEYMOUR J. KAGAN

Dated: June 25, 1996

R. 4:5-1 CERTIFICATION

I hereby certify that this matter is not the subject of any other pending action in any court or arbitration proceeding, that no other action or arbitration proceeding is contemplated and that, based upon present information, no other person should be joined in this proceeding.

BERRY, KAGAN, SAHRADNIK & KOTZAS
A Professional Corporation
Attorneys for Plaintiff

By: /s/ Seymour J. Kagan
SEYMOUR J. KAGAN

Dated: June 25, 1996

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
CIVIL PART
DOCKET NO. OCN-L-2456-95

DARWIN GRIFFITH, Plaintiff, vs. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant.	TRANSCRIPT OF TRIAL

PLACE: OCEAN COUNTY COURTHOUSE
Washington Street
Toms River, New Jersey 08753
DATE: July 31, 1997

BEFORE:
HONORABLE MARLENE LYNCH FORD, J.S.C.

TRANSCRIPT ORDERED BY:

STEPHEN BROWER, Senior Deputy Attorney General

APPEARANCES:

SEYMOUR J. KAGAN, ESQ., (Berry, Kagan, Sahradnik & Kotzas), attorneys for plaintiff.
RACHEL HOROWITZ, ESQ., Deputy Attorney General, representing the New Jersey Department of Environmental Protection.

TRANSCRIBER:
PEGGY A. MASTRODICASA
RECORDING OPERATOR:

Gina Salotti

P. A. MASTRO & ASSOCIATES
Certified Court Transcribers
1465 CEDARHURST DRIVE
TOMS RIVER, NEW JERSEY 08753

732-270-4904 TOLL FREE: 1-888-809-0100

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P-83	Report prepared in 1997.		156
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P-88	January 1995 evaluation and report.		165

* * *

[3] Tombs – Cross

R. BRADLEY TOMBS, RESUMES:

CONTINUED CROSS EXAMINATION BY MS. HOROWITZ:

Q Mr. Tombs, I'd like to ask you a couple of questions now again on the resource classification for this

property. Now, as I understood your testimony, after 1989 you did not perform any investigation to determine the resource value classification or whether it should be changed. Is my understanding correct?

A That's incorrect. After 1989 I didn't perform any resource classification –

Q Well, let me put it this way. Between – let me change that and say between 1989 and 1992, when the resource classification was changed by D.E.P. –

A Back to –

Q – you did not do any investigation on your own?

A When the D.E.P. reclassified it back to intermediate?

Q Yes, between that period. From 1989 until 1992.

A From 1989 to 1992. I don't recall specifically.

Q Okay. In any event, you did not submit anything to D.E.P. to show them whether their resource classification was right or wrong. That's correct, isn't it?

[4] A I did not submit anything, but it doesn't – I may have done something in that time frame and provided it to Mr. Griffith or Mr. Kagan. I don't recall.

Q You don't recall and, in any event, it didn't make its way to D.E.P.?

MR. KAGAN: Objection, that's an assumption which is factually inaccurate –

MS. HOROWITZ: Okay, I will withdraw it.

MR. KAGAN: – in addition to being speculative, the question to this witness.

MS. HOROWITZ: I'll withdraw it.

THE COURT: All right.

BY MS. HOROWITZ:

Q Now, subsequent to 1992 and specifically in conjunction with the CAFRA application, you did perform some additional investigation with respect to this issue. Is that correct?

A I'm sure it was performed before the application was submitted. So, the application was submitted in '92, I presume it was done around that time. There was some very intense studies done, yes.

Q Well, were you not asked, as part of the preliminary analysis, which is J-51 in evidence, to do some further investigation with respect to certain species, namely, the Pine Barrens Tree Frog, Swamp

* * *

[101] Stanton – Direct

particular application

Q Mr. Stanton –

THE COURT: Rather than repeat it.

Q Mr. Stanton, are you familiar with the customs and practices and the handling of individual freshwater wetlands applications by the D.E.P.?

A I would say yes based on the ones that I've seen gone by. I would assume they were customary.

Q And with reasonable certainty, in your capacity as a professional engineer, do you have an opinion as to whether the handling of Mr. Griffith's freshwater wetlands application was customary?

A I would say no.

Q You don't have an opinion?

A No. Yes, I do have an opinion, yes.

Q And what is that opinion then?

A The opinion is it was not customary based on my previous experience.

Q Why do you say that?

A In general, previous experience indicated a reasonable degree of cooperation, helpfulness, explaining what you have to do to do it or why you could not do it.

In this case, it appeared to be just a roadblock at every turn without help to get around it. Just it [102] was a roadblock. A lot of delays. I think requests for things that were not necessary.

Q Okay. Which of the department's positions with regard to Mr. Griffith's freshwater wetlands permit application did you find to be unreasonable and not customary –

MS. HOROWITZ: Objection.

Q – based on your experience?

MS. HOROWITZ: Objection to the term unreasonable.

MR. KAGAN: Okay.

THE COURT: Well, unreasonable within the context of the practices and procedures, not unreasonable in the context of a subjective evaluation that you personally found it to be unreasonable. Okay?

Q Do you understand that, Mr. Stanton?

A I don't think so.

Q Okay. Let me see. In the context of the customary way the department handled freshwater wetlands applications, what specifically did you find to be unreasonable in the manner in which the department handled Mr. Griffith's freshwater wetlands application?

A You're saying the way they handled it.

Q Right. What positions did they take which you consider to be unreasonable in – as opposed to the [103] normal way they handled these issues?

A Okay. In one case, they limited the width of the road to 16 feet. Normally, they didn't tell you what you were allowed to do. They would tell you why you couldn't do what you wanted to do and help you as far as what you would have – what you would have to address to overcome the problem you had.

In this case, they just said, 16 feet is as much as you can have. I didn't feel that was a reasonable width for the – what we were looking for.

The other thing was –

Q Excuse me. Before you go on, before you go on to the other thing. Why was 16 feet unreasonable in the context of what the applicant was looking for?

A Well, the applicant had 40 acres of upland property. The developability of 40 acres of upland property is in virtually every case considered to be more than one single-family home. A 16-foot – I can't even call it a road; I would call it an access drive – would be adequate for a single-family home. The minute you put two single-family homes or something more than one single-family home where you would have multiple use of that accessway, you come into a situation where you're talking a public right-of-way, in most every case, or something that's equivalent to a public right-[104]of-way.

The minimum widths for roads in a public right-of-way normally and in all cases where it's the only access have to be two way. Sixteen feet is not adequate for two way. Two way, typically, in the regulations in the State of New Jersey and the different towns and now in the new residential site development standards, would normally be up around 20 feet or 30 feet for a roadway that is two way. We've been known to be able to justify down to 26 feet for a roadway, but nothing, in my experience, less than that.

Q And did the – again, I invite your attention to P-93 in evidence, which is a plan that was submitted with the freshwater wetlands application. And did you participate in the preparation of the note that is reflected on that exhibit?

A Yes, I did.

Q Okay. Is this language common language for the purpose of indicating the intensity of use contemplated by the applicant?

MS. HOROWITZ: By the applicant for what?

MR. KAGAN: For this – for any type of development of this type.

A Normally, we wouldn't have put a note on it. In this case, for whatever reason, we felt that some [105] indication of the use of the land was appropriate to show that, in fact, it wasn't going to be a single-family house, which could utilize a small driveway.

We felt that we have compromised the normal township requirements as much as we could with 26 feet and that at the time Mr. Griffith had indicated he wanted to go ahead with developing the property, but he felt that before it could be deemed developable, he had to have access.

Q Now, did at any time any official from the D.E.P. communicate to any representative of Mr. Griffith or Mr. Griffith himself that you became aware of which required as a precondition for the granting of the individual freshwater wetlands application, a site plan showing a major subdivision for anything more than a 16-foot wide road?

MS. HOROWITZ: Objection, hearsay.

MR. KAGAN: Well –

THE COURT: He's asking for an inquiry by a D.E.P. official. So, I'll allow the – overrule the objection. You can answer it.

A It's my recollection that when the 16 feet was handed out there was a communication of some sort from the D.E.P. indicating that without a plan for the development of that site, they would not approve [106] anything more than 16 feet wide.

Q Now, with respect to the location of the access road, did the D.E.P. raise questions with – and make requested changes as to the location which, in your experience, was not customary given the nature of the freshwater wetlands application made by Mr. Griffith?

A The plan that we submitted, as shown on the board that you just showed me, shows the road swinging out away from its property line at Nugentown Road in order to come in at – closer to Nugentown Road and provide some room for a site triangle as required by the Township of Little Egg, without impacting the neighbor's property while imposing a site triangle on there.

The initial, I guess, first shot at a permit that came through indicated that the road should be immediately adjacent to that property line, which would cause an impact on the adjoining property.

Q Now, that requirement to relocate the road adjacent to the – immediately adjacent to the property line of an adjacent property owner, in your opinion as a professional engineer, was that sound engineering practice?

A Not in this circumstance.

Q And why not?

[107] A In this circumstance, the adjoining property has a couple of houses. Actually it's two lots that this would butt up against. They already have access to

Nugentown Road. There's little or no potential for development along that property line with new facilities that could utilize that road. You would not normally put a road against somebody's property line.

From a physical impact standpoint, it's difficult to build something exactly on a property line without physically impacting the other property, which Mr. Griffith would not have a right to do. He would have to keep all the disturbance on his property. By placing the road right on the property line, as they indicated, it would be almost impossible to build the edge of the road. He may also not be able to grade it property and meet the proper standards.

It would place a large piece of the adjoining property owner's land within the site triangle from the road, which would limit the use of the land and impact economically on the neighbor.

If there was no development on that land, it was a large tract, it would be advantageous to the neighbor to have a road next to him. He still could not build a physical road right up to the property line unless you got the proper easements and permission from the [108] adjoining owner.

Q Does not this exhibit, P-93, reflect the location of homes on the site?

A Yes, it does.

Q And is this Lot 28 and said Allen, the Allen, Jr., John S. it says, does it not?

A Yes.

Q Okay. Does the local engineering standards reflected in the Municipal Land Use Laws require a certain minimum angle of entry to a road as proposed by Mr. Griffith?

A Most municipal ordinances have some limitation as to the degree of variation from 90 degrees that would be allowed within their road design except under very unusual circumstances.

Q And would the suggested relocation of the road by the Department of Environmental Protection violate that standard?

A It's my recollection that it did, yes.

Q And is that a safety factor?

A Yes.

Q Now, are you familiar with the delays incurred by Mr. Griffith in the various steps pertaining to the individual freshwater wetlands permit application?

A Yes.

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TRENTON

DIVISION OF COASTAL RESOURCES

EXHIBIT
I.D. P-5
EVD.
DATE 1/16/97
COLLEEN M. VAUGHN, C.S.R.

PLEASE ADDRESS REPLY TO:
CN 401 ___
TRENTON, N.J. 08625

EXHIBIT
I.D. P-18
EVD.
DATE 1/6/96
COLLEEN M. VAUGHN, C.S.R.

January 5, 1988

Peter L. Tweedt, Director
United States Department of Commerce
National Oceanic and Atmospheric Administration
National Ocean Service
Office of Ocean and Coastal Resource Management
Washington, DC 20235

Dear Mr. Tweedt:

John Weingart has asked me to respond to your letter of November 20, 1987 concerning New Jersey's Federal consistency objection to a project proposed by Darwin Griffith. The Division amended its October 22, 1987 letter on November 10, 1987 to inform Mr. Griffith of his right to appeal the Division's determination. I note that our letters may be crossing in the mail.

For your information the Division of Coastal Resources has been in contact with Mr. Griffith this week regarding his proposed 30 foot wide road across wetlands to serve one home. *He advised us that his intention is to build about 30 residences.* This information amends the terms under which the Federal consistency decision was made. This may lead to a settlement.

Sincerely,

/s/ Steven C. Whitney
Steven C. Whitney, Chief
Bureau of Planning &
Project Review

SCW:sk
c: R. Gary Bakelaar, BP&PR
Darwin Griffith

BERRY, KAGAN, PRIVETERA & SAHRADNIK
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
212 HOOPER AVENUE
P.O. BOX 757
TOMS RIVER, NJ 08754

AREA CODE 201 349-4800

[Name And Addresses Omitted In Printing]

January 20, 1988

State of New Jersey
Department of Environmental Protection
Division of Coastal Resources
CN 401
Trenton, New Jersey 08625

Attention: Mr. John R. Weingart, Director
or
Mr. Steven C. Whitney, Chief
Bureau of Planning & Project Review

State of New Jersey
Department of Environmental Protection
Division of Water Resources
CN 029
Trenton, New Jersey 08625

Attention: Brian McLendon,
Bureau of Water Resources
Management Planning

Re: Block 78, Lot 33 in Little Egg Harbor
Twp., Ocean County, NJ
Fill Permit Application of Darwin R. Griffith
U.S. Army Corps CENAP-CP-R-87-2003-15
(formerly NAPOP-R-87-0700-15)
N.J.D.E.P. Division of Coastal Resources
#FC-87-31

N.J.D.E.P. Division of Water Resources
WQC #87-4-6

Gentlemen:

Unfortunately, the drawing prepared by Fellows, Read & Associates, I[illegible] titled "Plan of Access Road" (Rev. 2; 10-19-87) and forwarded for your review on November 30, 1987, did not clearly indicate that the 30 foot wide access road, shown thereon, is intended to serve more than a single residence. Therefore, the 8 foot wide driveway, suggested in your letter of December 29, 1987, is not a functional alternative.

Accordingly, the drawing enclosed herewith reflects your request for definition in this respect and now incorporates the following changes:

1. The basic "R-200" Zone criteria applying to the approximate 40 acres of developable land has been added.

2. Fellows, Read & Associates have concluded a projected maximum density of 75 residential units for this area in accordance with the Township requirements for this zone (even after pre-supposing a drastic reduction in projected density, construction of the proposed 30 foot wide access road remains reasonable and warranted).

3. Compliance with the master plan of Little Egg Harbor Twp. mandated a slight realignment of the proposed access road (Nugentown Road was found to be classed as a 60 foot wide "collector" street along this section of its right-of-way); the minimum standards governing paving width, angle of intersection, site triangle,

etc. were used so the environmental impact would not exceed that dictated by these local stipulations.

A revised application form CP#1, initially submitted on 4/20/87 conforming to the data indicated on the enclosed "Plan of Access Road" drawing is also included.

On behalf of Mr. Griffith, I request your reconsideration of this application for the following reasons:

A. Previously submitted data evidences that a feasible alternative, to the proposed wetlands incursion, does not exist.

B. The proposed introduction of acceptable fill material is the most reasonable means of providing rightful access to the property, and still ensures a minimal environmental impact.

C. Considering all factors, it appears that denial of this application could inflict significant financial hardship upon my client; it also appears possible that such a circumstance could quite conceivably be interpreted as a compensable "taking" (arising from a June 1987 decision, rendered by the U.S. Supreme Court in a State of California case).

Mr. Griffith is not a developer; his interest in establishing approval for this 30 foot wide access road is to protect the inherent utilization of his property for ultimate development by a third party. However, it is also client's desire to work with the State authorities to obtain an amicable solution that both satisfies the State's legitimate interest in preserving environmentally sensitive properties and at the same time allows my client to realize his goal in a justifiable fashion.

Toward that mutually desirable end, it appears to me that it would be beneficial to have meeting to exchange ideas which would result in a settlement as suggested in your January 5, 1988 letter.

Accordingly, I will be telephoning your offices to arrange such a meeting, at your earliest convenience.

Sincerely yours,

/s/ Seymour Kagan
SEYMOUR KAGAN

(2)

Supreme Court, U.S.
FILED
JAN 22 2002
CLERK

No. 01-853

In the

Supreme Court of the United States

DARWIN R. GRIFFITH,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ of Certiorari To The Superior Court Of New Jersey, Appellate Division

Brief of the Respondent In Opposition to the Petition for Certiorari

David Samson
Attorney General of New Jersey
Attorney for State Respondent
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625
(609) 633-8119

Michael J. Haas
Assistant Attorney General

Rachel J. Horowitz
Deputy Attorney General
Counsel of Record and On the Brief

1499

QUESTIONS PRESENTED

Where petitioner's property contained both uplands and wetlands and where petitioner did not complete his application to develop the uplands, but brought an inverse condemnation action after the State had issued a wetlands permit for an access road to the uplands, and before a waiver provision applicable to development of the property had been applied, and before the New Jersey Appellate Division had completed its review of petitioner's challenge to the wetlands permit as unreasonable:

1. Did the New Jersey Appellate Division properly reject petitioner's claim of a compensable temporary taking under the Fifth Amendment, after determining that the State had engaged in a reasonable administrative process and that development delays were caused by the owner's decision to pursue the inverse condemnation action prematurely and to forego the application process?

2. Is a landowner who files an inverse condemnation action before completing available administrative remedies and who subsequently obtains all requested development approvals as the result of the completion of a reasonable administrative process entitled to compensation?

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STATEMENT OF THE CASE

This petition seeks review of the New Jersey Appellate Division's decision that the State did not temporarily take the property of petitioner Darwin R. Griffith without just compensation. Petitioner's property contains 40 acres of uplands and 23 acres of freshwater wetlands, and has road frontage consisting entirely of wetlands. When the property was carved out of a much larger parcel by partition, permits were required to disturb the wetlands and to develop the uplands with more than 24 residences. Petitioner applied for a permit to construct a road through the wetlands to the uplands in July 1988, but did not submit development plans for the uplands until November 1993.

The State issued wetlands permits as well as approvals for upland development pursuant to an administrative process which the Appellate Division found was reasonable and did not entail any extraordinary delay attributable to the State. In addition, the Appellate Division determined that petitioner had brought his inverse condemnation action prematurely before applying to develop the uplands, and that delays were caused by petitioner's decision to pursue the lawsuit and forego the application process.

Despite these circumstances, petitioner argued that the State had effected a temporary taking of his property from June 1992, when the State issued a wetlands permit for an access road to the uplands, until the date the administrative process for development of the uplands was concluded. The Appellate Division rejected these assertions and the New Jersey Supreme Court denied certification and dismissed petitioner's appeal.

A. STATEMENT OF FACTS

In 1984, petitioner Darwin R. Griffith acquired a 63-acre site and other properties as the result of a partition action. As created by the partition from a much larger parcel, the site contained both uplands and wetlands and had road frontage on

Nugentown Road consisting entirely of freshwater wetlands. In addition, permits were required to disturb the site's wetlands and to develop its uplands with more than 24 units. In the partition, Griffith also obtained an access easement to the 63-acre site from Bridge Road, another public road (Pet. App.2 - Pet. App.3; Pet. App.5; Pet. App.23; Pet. App.39).

Griffith sold two of the other properties acquired in the partition for nearly one million dollars, and then applied to respondent State of New Jersey, Department of Environmental Protection ("NJDEP") for a freshwater wetlands permit, seeking a road through the wetlands of the 63-acre site to its uplands. The application did not contain any development plans for the uplands (Pet. App.2 - Pet. App.4).

In 1989, NJDEP denied the wetlands permit, based in large part on its view that the access easement from Bridge Road could provide viable alternative access to the uplands (Pet. App.140 - Pet. App.141). Following administrative proceedings, however, in June 1992 NJDEP issued a wetlands permit for a road through the wetlands next to Nugentown Road to the uplands. The permit limited the road's width to 16 feet to minimize environmental impacts, but provided that an application to modify the permit and widen the road could be filed upon approval of development in the uplands (Pet. App.4).

In November 1993 and January 1994, Griffith applied to NJDEP for a 44-lot residential subdivision in the uplands and to amend the County Water Quality Management Plan to include the proposed subdivision in a sewer service area. After Griffith refused to supply information required to complete the subdivision application, NJDEP canceled the application in December 1994 and denied the sewer service request in early 1995 (Pet. App.5 - Pet. App.6). NJDEP also modified the wetlands permit in May 1994 to allow an application for a wider road to be filed at any time, and advised Griffith that it could not approve his wetland

mitigation plan (Pet. App.4; Pet. App.6 - Pet. App.7; Pet. App.215 - Pet. App.220).

B. PROCEEDINGS BELOW

Griffith challenged the wetlands permit decision of 1994, the cancellation of his application for upland development, the denial of his request related to sewer service and the action on his wetlands mitigation plan in the Appellate Division (Pet. App.4; Pet. App.6). In June 1995, while these appeals were pending, he filed an inverse condemnation action in the Law Division, alleging that NJDEP's actions since 1989 had caused a regulatory taking (Pet. App.8).

In May 1996, the Appellate Division held that NJDEP had reasonably canceled Griffith's application for a 44-lot subdivision of the uplands, and that there were available administrative remedies that had not been pursued related to sewer service and the wetland mitigation plan (Pet. App.37 - Pet. App.68). The Appellate Division also held that NJDEP's wetlands decision of 1994 was unreasonable, reasoning that once Griffith had applied to the agency to develop the uplands in 1993, it should not have continued to require him to apply for a permit modification for a wider road (Pet. App.22 - Pet. App.36).

In the fall of 1996, NJDEP issued a new, modified wetlands permit to Griffith in compliance with the Appellate Division's decision, invited him to again apply to develop the uplands, and advised him that the uplands could be developed at a "moderate" intensity (Pet. App.8; Pet. App.221 - Pet. App.222). However, Griffith decided to pursue his inverse condemnation action and to forego the application process. In 1998, the trial court found a permanent taking of the site as of June 25, 1992, the date NJDEP issued a permit for a 16-foot wide road through the wetlands, although NJDEP had issued a modified wetlands permit in 1996 and petitioner had never completed his application to develop the uplands after being

invited to do so (Pet. App.8 - Pet. App.9). In 1999, the Appellate Division reversed the trial court's takings decision, because the lower court had entered its takings judgment before allowing NJDEP to implement a statutory provision within the State's Freshwater Wetlands Protection Act, which permits the agency to relax a regulatory standard to avoid a taking of property without compensation (Pet. App.105 - Pet. App.114).

On remand to the trial court, NJDEP approved petitioner's application for a 43-lot subdivision on sewers and waived its wetlands mitigation fee requirement and other fees (Pet. App.2). In 2000, the trial court awarded compensation of $264,000 to Griffith for a temporary taking from June 1992 to September 1999, as well as attorneys' fees (Pet. App.115 - Pet. App.136). In 2001, on appeal by NJDEP, the Appellate Division reversed that decision (Pet. App.1 - Pet. App.21).

The Appellate Division found that the inverse condemnation action had been filed prematurely in 1995 before the completion of the administrative process, which included the application to develop the uplands, the waiver process provided by the State's Freshwater Wetlands Protection Act, and judicial review of the wetlands permit. The Appellate Division also determined that NJDEP had conducted a reasonable administrative process which had not entailed any extraordinary delay, and that petitioner's decision to forego NJDEP's invitation to submit applications to develop the uplands had deprived him of the use of the property, not NJDEP (Pet. App.1 - Pet. App.21). The New Jersey Supreme Court denied certification and dismissed Griffith's appeal in September 2001 (Pet. App.137).

REASONS FOR DENYING THE WRIT

This Petition does any present any issue requiring resolution by this Court, but simply involves the application

of settled law to the facts and petitioner's complaint that the court below misapplied precedent. This Court previously has held that a requirement to obtain a permit does not cause a regulatory taking, and also has held that fluctuations in property value caused by the governmental decision-making process are attributes of ownership, not regulatory takings, in the absence of extraordinary delay. In addition, this Court has determined that a regulatory takings claim is not ripe until the responsible agency has made a final determination of what development will be allowed under the regulatory scheme, which includes the opportunity to grant any applicable waiver or variance.

The Appellate Division applied these existing standards to the record, and decided that NJDEP had engaged in a reasonable administrative process that did not involve any extraordinary delay attributable to the agency. In addition, based on its review of the record, the Appellate Division found that petitioner had filed his inverse condemnation action prematurely before completing the available application process, and that this strategic decision deprived him of the use of the property, not the government. The Appellate Division reached these conclusions after applying the standards set by this Court to the record. Further review by this Court would involve this Court in a new review of the record that is completely unnecessary.

In addition, the Appellate Division's decision was based in part on its interpretation of a section of the State's Freshwater Wetlands Protection Act that allows NJDEP to avoid a regulatory taking by relaxing regulatory standards and approving development. The Court should not revisit this issue of State law decided by the State's intermediate court.

This case is a fact-sensitive matter in which the Appellate Division properly determined that an administrative process that led to the approval of a 43-lot subdivision on sewers and included the granting of three wetlands approvals was

reasonable and did not entitle petitioner to compensation for a temporary taking. To reach its conclusion, the Appellate Division correctly rejected petitioner's contention that the State had engaged in extraordinary delay, and properly decided that petitioner was deprived of use of the property because he decided to prematurely seek compensation through an inverse condemnation action, and to forego the application process to develop the uplands.

This Court has squarely held that a requirement to apply for a permit does not cause a regulatory taking, and also has recognized that fluctuations in value during the governmental decision-making process do not cause a taking, unless there is extraordinary delay attributable to the government. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985); Danforth v. United States, 308 U.S. 271, 285 (1939); Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320-21 (1987). In addition, this Court has repeatedly held that a regulatory takings claim is not ripe until the responsible agency has finally determined what development will be allowed under the applicable regulatory scheme, which includes any pertinent opportunity to grant a waiver or a variance. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 186 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 351 (1986); Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 297 (1981); Palazzolo v. Rhode Island. 533 U.S. 606, ___, 121 S. Ct. 2448, 2459, 150 L. Ed. 2d 592, 609 (2001).

The Appellate Division applied these standards, which both parties to the case agree upon, to reach its conclusion that there had not been a temporary taking of petitioner's property (Pet. 15). Granting the Petition for Certiorari would engage this Court in the resolution of a factual dispute and in the review of a record previously examined by the State

Appellate Division. Thus, the Petition for Certiorari should be denied.

The New Jersey Appellate Division's application of these settled standards to the facts was eminently reasonable. First, as the court noted, it was not until the administrative appeal of the June 1992 wetlands permit was well underway that an application to develop the uplands was finally filed. Petitioner could not have been deprived of the viable economic use of his land by reason of the wetlands permit alone, since economic use of the property could not have been realistically made without an application to develop the uplands.

Second, the Appellate Division correctly concluded that the State engaged in a reasonable administrative process when it reviewed the application for a road through the wetlands to the uplands. The State initially denied a permit for the road, because it believed that the access easement secured through the partition action constituted a viable alternative. However, as a result of the administrative appeals process, the State permitted the construction of a road through the wetlands in 1992, and modified that permit in 1994. In 1996, following appellate review of the wetlands permit, the State issued another modified wetlands permit to Griffith.

A permit for upland development was essential to the use of the property, but Griffith delayed applying for that permit and then refused to complete the application. The Appellate Division upheld as reasonable NJDEP's processing of this key application. Petitioner's suggestion that the State's permitting actions were unreasonable is unfounded, in light of these facts. In addition, addressing petitioner's complaint that the judicial appeals process should not have been deemed a part of the administrative process, and constituted an unreasonable delay, would not affect the disposition of this matter. Petitioner appealed the cancellation of his application to develop the uplands, but that appeal was rejected.

Afterwards, Griffith chose to pursue his inverse condemnation action and to forego the application process to develop the uplands. As the Appellate Division determined, it was this conduct which deprived petitioner of the use of the property, not the State. [1]

Another ground on which the Appellate Division relied was a provision of the State's Freshwater Wetlands Protection Act, N.J. Stat. Ann. 13:9B-22(b), which the court recognized as a part of the administrative process that must be used to determine what development is permissible (Pet. App. 13). This Court has expressly held that a takings claim is not ripe if it is filed before the responsible agency finally determines the extent of permitted development on the land, and has had the opportunity to grant any applicable waiver or variance. In addition, a State is entitled to establish procedures for the consideration of development applications and subsequent takings claims. Palazzolo v. Rhode Island, 533 U.S. 606, _, 121 S. Ct. 2448, 2459-62, 150 L. Ed. 2d 592, 609-612 (2001). It would not be appropriate for this Court to review the Appellate Division's interpretation of N.J.Stat. Ann. 13:9B-22(b), which is a part of the procedures established by New Jersey to consider development applications and subsequent takings claims.

The Petition for Certiorari should be denied, and not held pending review of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, No. 00-1167. That case involves a temporary moratorium which precluded development, but this Petition does not. Rather, it involves a permitting process which the State's appellate court

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[1] A further reason that no taking occurred is that the 63-acre site was not the entire parcel, as the site was carved out of a much larger property by partition. All of the properties awarded to petitioner in the partition, including two sites previously sold for nearly one million dollars, constituted the parcel as a whole. The Appellate Division did not reach this issue, which the State raised below.

determined was conducted in a reasonable fashion, based on its review of the record and correct application of precedent.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

David Samson
Attorney General of New Jersey
Attorney for State Respondent

Michael J. Haas
Assistant Attorney General

Rachel J. Horowitz
Deputy Attorney General
Counsel of Record and On the Brief

R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625
(609) 633-8119

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